Vellasamy a/l Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN 35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) v Gurbachan Singh a/l Bagawan Singh & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–91 OF 2006
ZAINUN ALI, ABDUL MALIK ISHAK AND ABU SAMAH JJCA
1 DECEMBER 2009

Civil Procedure — Representative action — Requirements — Whether satisfied — Whether exact identities of persons represented by plaintiffs must be stated — Whether fact that each representee would be entitled to different measures of relief negated representative action

Companies and Corporations — Separate legal entity — Lifting the veil of incorporation — Whether justice of case demanded veil to be pierced — Solicitor formed company to defraud clients — Whether veil pierced

Land Law — Sale of land — Beneficial ownership — Whether sub-purchasers of land retained beneficial interest in land despite various subsequent dealings with it

Legal Profession — Liability as fiduciary — Conflict of interest and duty — Solicitor acting for beneficial owners of land — Solicitor purchased same land for own benefit — Whether breach of fiduciary duty to clients — Whether solicitor to account to clients for gains made out of breach of fiduciary duty

Trusts and Trustees — Constructive trust — Whether established — Breach of fiduciary duties by solicitor — Whether constructive trust arises over gains made from breach of fiduciary duty

The plaintiffs/appellants were the sub-purchasers of some plots of land ('the said land') from one Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPKB'). The plaintiffs purported to represent some 213 other sub-purchasers of plots of the said land. The first defendant/ first respondent was an advocate and solicitor who had initially attended to the woes of some of the sub purchasers. Subsequently, the first defendant in his personal capacity bought the said land by way of a tender, which was undertaken by

the receivers and managers of the third defendant/third respondent ('SEP'). The land had been charged to the fifth defendant/fifth respondent (MBf). The first defendant then set up a company, the fourth defendant/fourth respondent ('Regal') with his wife and a friend. All three of them became directors of Regal. The first defendant then transferred the land to Regal. The plaintiffs sought to be declared as either the lawful or beneficial owners according to the plots that they held under their agreements with SPPKB. The two central issues were: (i) whether the plaintiffs, as original purchasers of the said land, retained an equitable right in the said land that was not extinguished despite the various subsequent dealings with it; and (ii) whether the first defendant had acted as a solicitor for the plaintiffs and, thus, the first defendant had purchased the said land as their trustee and that the purchase was not done by the first defendant in his personal capacity but on behalf of the plaintiffs. Another issue that required consideration was whether or not this suit was a properly constituted representative action. After a full trial, the High Court dismissed the plaintiffs' claims and hence this appeal by the plaintiffs.

Held, allowing the appeal with costs here and below:

(1) (per **Zainun Ali JCA, dissenting**) The plaintiffs had not established fraud on the part of any of the relevant parties. Thus, it was not open to the plaintiff's to now declare that they had either an equitable or beneficial interest, since the land was sold to the first defendant by way of a public auction undertaken by the fifth defendant who enjoyed an unequivocal, indefeasible charge over the land. Therefore, the court should not allow the lifting of the corporate veil in determining the plaintiff's interest. The fifth defendant was an innocent chargor without notice of the agreement between the sub-purchasers and SPPKB and their 'interest' in the land (see paras 65–66 & 128).

(2) (per **Zainun Ali JCA, dissenting**) There was no evidence of any contract between the first plaintiff and sub-purchasers. Thus, there was no evidence of fiduciary relationship. And even if there was, it had not been proven that the first defendant had contrived the situation in such a manner as to exert undue influence on the plaintiffs and sub-purchasers. The 'retainer' if at all it could be termed as such merely consisted of the first defendant lodging caveats for some of the sub-purchasers and writing one or two letters to relevant parties for them. In that connection, it could hardly be described as confirming the first defendant's status as their lawyer, acting in all other respects with regards the land, for the plaintiffs and sub-purchasers (see paras 158–159 & 215).

(3) (per **Zainun Ali JCA, dissenting**) The exact identity of the persons whom the four named plaintiffs were representing was not critical nor

imperative. The absence of these was not an impediment to commencing a representative action so long as they were a class of persons with a common interest and a common grievance. The representative action was properly constituted even if in the event of success, they would be entitled to different measures of relief (see paras 273–274).

(4) (per **Abdul Malik Ishak JCA**) The sale of the land to the first defendant did not break the equitable rights of the sub-purchasers for the following reasons: (i) The MBf charge was invalid because it was registered without the prior consent of the relevant state authority; (ii) in the absence of consent, the transfer and registration of the land were invalid and void and the defendants could not override the equitable rights of the sub-purchasers; and (iii) since the first defendant was fully aware of the rights of the sub-purchasers he could not be a bona fide purchaser for value without notice. Thus the first defendant was bound by the sub-purchasers' equity (see para 322 & 322(a)–(c)).

(5) (per **Abdul Malik Ishak JCA**) A person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain which has been obtained in circumstances where a conflict or a significant possibility of conflict existed between his fiduciary duty and his personal interest. Constructive trust arises from the fact that a personal benefit or gain has been so obtained or received and it is immaterial that there was absence of good faith or damage to whom the fiduciary duty was owed (see paras 325–326).

(6) (per **Abdul Malik Ishak JCA**) The registered ownership of the land to Regal was equally tainted. Regal was a shell company taken over by the first defendant and was essentially his alter ego. He took Regal specifically to transfer the land which was in his name to Regal. The first defendant was the promoter, shareholder and director of Regal. The transfer of the land in the name of Regal did not break the equity of the sub-purchasers because Regal through the first defendant had full knowledge of the equitable rights of the sub-purchasers of the land (see para 329).

(7) (per **Abdul Malik Ishak JCA**) All the transactions from SEP to Regal were done with full knowledge of the sub-purchasers' rights. The justice of the case demanded that the veil of incorporation be pierced (see paras 333 & 336).

(8) (per **Abdul Malik Ishak JCA**) The representation as well as the conduct of the first defendant together with the string of letters written by the first defendant and by others to the first defendant — all categorically established the solicitor-client relationship. A solicitor has a fiduciary duty in equity to his client. The solicitor and client relationship carried

with it obligations on the solicitor's part to act with absolute fairness and openness towards his client. A solicitor must not without the informed consent of his client stand to make any profit or receive any benefit other than his professional remuneration from the transaction which he is retained to carry through. It is no defence to the solicitor to say that his interest is indirect, like for instance, where the transaction is between his client and a company in which he or a member of his family has a significant shareholding or where he otherwise has an indirect financial interest in the transaction (see paras 375 & 390).

[Bahasa Malaysia summary

Plaintif-plaintif/perayu-perayu merupakan pembeli kedua ('sub-purhasers') beberapa petak tanah ('tanah tersebut') daripada Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPKB'). Plaintif-plaintif dikatakan mewakili 213 pembeli-pembeli kedua yang lain beberapa petak tanah tersebut. Defendan/responden pertama merupakan peguambela dan peguamcara yang pada mulanya menangani rungutan beberapa pembeli atas tangan tersebut. Kemudiannya, defendan pertama dalam kapasiti peribadinya membeli tanah tersebut menerusi tender, yang dikeluarkan oleh penerima dan pengurus defendan/responden ketiga ('SEP'). Tanah tersebut telah dicagarkan kepada defendan/responden kelima (MBf). Defendan pertama kemudian menubuhkan sebuah syarikat, defendan/responden keempat ('Regal') bersama isteri dan seorang rakannya. Ketiga-tiga mereka menjadi pengarah Regal. Defendan pertama kemudiannya memindah milik tanah tersebut kepada Regal. Plaintif-plaintif memohon untuk diisytiharkan sama ada sebagai pemilik di sisi undang-undang atau benefisial ke atas petak-petak tanah yang dipegang di bawah perjanjian dengan SPPKB. Dua isu utama di sini ialah: (i) sama ada plaintif-plaintif, sebagai pembeli asal tanah tersebut, mempunyai hak ekuiti ke atas tanah tersebut dan tidak terhapus walaupun beberapa urusan ke atas tanah tersebut berlaku selepas itu; dan (ii) sama ada defendan pertama telah bertindak sebagai peguamcara kepada plaintif-plaintif dan oleh itu, defendan pertama membeli tanah tersebut sebagai pemegang amanah mereka dan bahawa pembelian tersebut tidak dilakukan oleh defendan pertama dalam kapasiti peribadinya tetapi bagi pihak plaintif-plaintif. Satu lagi isu yang memerlukan pertimbangan ialah sama ada guaman ini adalah tindakan perwakilan yang betul. Setelah perbicaraan penuh, Mahkamah Tinggi menolak tuntutan plaintif-plaintif dan justeru rayuan ini oleh plaintif-plaintif.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) (oleh **Zainun Ali HMR, menentang**) Plaintif-plaintif tidak membuktikan fraud di pihak mana-manapun. Justeru, plaintif tidak boleh kini mengisytiharkan bahawa mereka tidak mempunyai

kepentingan ekuiti mahupun benefisial, memandangkan tanah tersebut telah dijual kepada defendan pertama menerusi lelongan awam oleh defendan kelima yang mempunyai cagaran nyata, tak boleh sangkal ke atas tanah tersebut. Oleh itu, mahkamah tidak harus membenarkan penyingkapan tabir penubuhan untuk menentukan kepentingan plaintif-plaintif. Defendan kelima merupakan pencagar yang tidak bersalah tanpa pengetahuan mengenai perjanjian antara pembeli-pembeli kedua dan SPPKB dan juga 'kepentingan' mereka atas tanah tersebut (lihat perenggan 65–66 & 128).

(2) (oleh **Zainun Ali HMR, menentang**) Tiada keterangan mengenai apa-apa kontrak antara plaintif pertama dan pembeli-pembeli kedua tersebut. Oleh itu, tiada keterangan mengenai hubungan fidusiari. Dan jika adapun, hubungan tersebut tidak membuktikan bahawa defendan pertama menghasilkan situasi sehingga mewujudkan pengaruh tak wajar terhadap plaintif-plaintif dan pembeli-pembeli kedua. Retainer tersebut, jika ada pun, hanyalah untuk defendan pertama memasukkan kaveat-kaveat bagi beberapa pembeli-pembeli kedua tersebut dan menulis satu atau dua pucuk surat kepada pihak-pihak yang berkenaan bagi pihak mereka. Berkaitan itu, tidaklah boleh mengesahkan status defendan pertama sebagai peguam mereka, bertindak dalam kesemua hal lain berkaitan tanah tersebut bagi pihak plaintif-plaintif dan pembeli-pembeli kedua (lihat perenggan 158–159 & 215).

(3) (oleh **Zainun Ali HMR, menentang**) Identiti tepat orang-orang yang diwakili oleh keempat-empat plaintif yang dinamakan adalah tidak penting atau mustahak. Ketiadaan perkara tersebut tidak menghalang permulaan tindakan perwakilan selagi mereka merupakan sekumpulan individu dengan kepentingan dan kilanan yang sama. Tindakan perwakilan plaintif-plaintif adalah dimulakan dengan betul dan jika berjaya, mereka berhak ke atas ukuran relief yang berbeza (lihat perenggan 273–274).

(4) (oleh **Abdul Malik Ishak HMR**) Penjualan tanah tersebut kepada defendan pertama tidak mematahkan hak-hak ekuiti pembeli-pembeli atas tangan atas sebab-sebab berikut: (i) cagaran MBf adalah tidak sah kerana didaftarkan tanpa kebenaran pihak berkuasa negeri yang berkenaan; (ii) dalam ketiadaan kebenaran, pindah milik dan pendaftaran tanah tersebut adalah tidak sah dan batal dan defendan-defendan tidak boleh mengatasi hak-hak ekuiti pembeli-pembeli kedua; dan (iii) memandangkan defendan pertama maklum sepenuhnya hak-hak pembeli-pembeli kedua dia bukanlah pembeli bona fide dengan nilai tanpa notis. Maka, defendan pertama terikat dengan ekuiti pembeli-pembeli kedua (lihat perenggan 322 & 322(a)–(c)).

(5) (oleh **Abdul Malik Ishak HMR**) Seseorang yang berkewajipan fidusiari

mestilah bertanggungjawab kepada orang yang dipertanggungjawabkan bagi apa-apa kepentingan atau faedah yang mana diperolehi daripada keadaan di mana suatu konflik atau kemungkinan wujudnya konflik yang penting antara kewajipan fidusiarinya dan kepentingan peribadinya. Amanah konstruktif berbangkit daripada fakta bahawa kepentingan atau faedah peribadi telah diperolehi atau diterima dan tidak lagi penting bahawa tidak wujud niat baik atau kerugian yang terhadapnya kewajipan fidusiari harus dilaksanakan (lihat perenggan 325–326).

(6) (oleh **Abdul Malik Ishak HMR**) Hak milik berdaftar tanah tersebut kepada Regal adalah cacat. Regal merupakan syarikat kelongsong yang diambil alih defendan pertama dan merupakan alter egonya. Dia mengambil alih Regal khususnya untuk memindah milik tanah tersebut yang mana di atas namanya kepada Regal. Defendan pertama merupakan penggalak, pemegang saham dan pengarah Regal. Pindah milik tanah tersebut atas nama Regal tidak mematahkan ekuiti pembeli-pembeli kedua disebabkan Regal, menerusi defendan pertama maklum sepenuhnya hak-hak ekuiti pembeli-pembeli kedua tersebut ke atas tanah tersebut (lihat perenggan 329).

(7) (oleh **Abdul Malik Ishak HMR**) Kesemua urus niaga daripada SEP kepada Regal dilaksanakan dengan pengetahuan penuh akan hak-hak pembeli-pembeli kedua tersebut. Keadilan kes ini memerlukan penyembunyian penggabungan tersebut didedahkan (lihat perenggan 333 & 336).

(8) (oleh **Abdul Malik Ishak HMR**) Perwakilan dan juga tindakan defendan pertama bersama dengan rentetan surat yang ditulis oleh defendan pertama dan oleh yang lain-lain kepada defendan pertama, kesemuanya disahkan sebagai hubungan peguamcara dan anak guam. Seorang peguamcara berkewajipan fidusiari dalam ekuiti kepada anak guamnya. Dalam hubungan peguamcara dan anak guam wujudnya kewajipan di pihak peguamcara untuk bertindak dalam keadilan mutlak dan terbuka kepada anak guamnya. Seorang peguamcara, tanpa persetujuan anak guamnya, tidak boleh membuat apa-apa keuntungan atau menerima apa-apa faedah selain daripada gaji profesionalnya daripada urusan yang dia telah diupah untuk laksanakan. Bukan menjadi pembelaan kepada peguamcara tersebut menyatakan bahawa kepentingannya adalah secara tak langsung, seperti contohnya, apabila urus niaga itu adalah antara anak guamnya dan sebuah syarikat yang mana dia atau ahli keluarganya mempunyai pegangan saham yang agak banyak atau apabila dia mempunyai kepentingan kewangan tak langsung dalam urus niaga tersebut (lihat perenggan 375 & 390).]

Notes

For cases on beneficial ownership, see 8(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4092–4099.

For cases on constructive trust generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2264–2290.

For cases on lifting the veil of incorporation, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 758–782.

For cases on requirements, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5976–5980.

Cases referred to

3464920 Canada Inc v Strother (2007) 281 DLR (4th) 640 (refd)

A Company, Re [1985] BCLC 333, CA (refd)

AB Ltd, In re [1956] MLJ 197 (refd)

Ar Pl Palaniappa Chettiar v Pl Ar Letchumanan Chettiar & Anor [1982] 1 MLJ 232, HC (refd)

Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, intervener) [1989] 1 MLJ 381, HC (refd)

Barclays Bank plc v O'Brien and another [1993] 4 All ER 417, HL (refd)

Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan [2002] 2 MLJ 399; [2002] 1 AMR 1201, FC (refd)

Begusic v Clark, Wilson & Co et al (1992) 92 DLR (4th) 273, SC (refd)

Bhagwan Singh & Co Sdn Bhd v Hock Hin Bros Sdn Bhd [1987] 1 MLJ 324, HC (refd)

Blyth v Fladgate Morgan v Blyth Smith v Blyth [1891] 1 Ch 337, Ch D (refd)

Boardman and another v Phipps [1967] 2 AC 46, HL (refd)

Boulting and another v Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606, CA (refd)

Braybrook, Braybrook v Wright, In re [1916] WN 74 (refd)

Bristol and West Building Society v Mothew [1998] Ch 1, CA (refd)

Canadian Pacific Railway Company v The King, on the information of the Attorney-General for Canada [1931] AC 414, PC (refd)

Carl Zeiss Stiftung v Herbert Smith & Co and another (No 2) [1969] 2 Ch 276, CA (refd)

Chin Cheng Hong v Hameed & Ors [1954] MLJ 169, CA (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Clark Boyce v Mouat [1994] 1 AC 428, PC (refd)

Conway v Ratiu; Note [2005] EWCA Civ 1302; [2006] 1 All ER 571, CA (refd)

Cooper v Whittingham (1880) 15 Ch D 501, Ch D (folld)

Datuk Hong Kim Sui v Tiu Shi Klan & Anor; Albert Teo Chin Kion v Tiu Shi Klan & Anor [1985] 1 MLJ 145, FC (refd)

Datuk Hong Kim Sui v Tiu Shi Kian & Anor [1987] 1 MLJ 345, PC (refd)

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)
Datuk Lim Kheng Kim, ex p Malayan Banking Bhd, Re [1990] 3 MLJ 496; [1990] 2 CLJ 682, HC (refd)
Dean v Bruce [1952] 1 KB 11, CA (refd)
Dingjan and others; Ex parte Wagner and another, Re (1995) 183 CLR 323 (refd)
Donald Campbell and Company, Limited v Pollak [1927] AC 732, HL (folld)
Dr Benjamin George & Ors v Majlis Perbandaran Ampang Jaya and other applications [1995] 3 MLJ 665, HC (refd)
Dr Ti Teow Siew & Ors v Pendaftar Geran-Geran Tanah Negeri Selangor [1982] 1 MLJ 38, HC (refd)
Duke of Bedford v Ellis and others, The [1901] AC 1, HL (refd)
Edmund Bowes, JB Martin and WL Kent v Charles Shand, Alexander Shand and RA Robinson (1877) 2 App Cas 455, HL (refd)
Eh Riyid v Eh Tek [1976] 1 MLJ 262, FC (refd)
Elizabeth Maddison v John Alderson (1883) 8 App Cas 467, HL (refd)
Eves v Eves [1975] 3 All ER 768, CA (refd)
Foster v Elsley (1881) 19 Ch D 518, Ch D (refd)
Fullwood v Hurley (1) [1928] 1 KB 498, CA (refd)
Furs Ltd v Tomkies and others (1936) 54 CLR 583 (refd)
George Bray v John Rawlinson Ford [1896] AC 44, HL (refd)
Gissing v Gissing [1971] AC 886, HL (refd)
Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd [1990] 3 MLJ 180, HC (refd)
Goo Hee Sing v Will Raja & Anor [1993] 3 MLJ 610, HC (refd)
Guardians of West Ham Union, The v The Churchwardens and Overseers and Guardians of the Poor of the Parish of St Matthew, Bethnal Green [1896] AC 477, HL (refd)
Hodgkinson v Simms [1994] 3 SCR 377; (1994) 117 DLR (4th) 161 (refd)
Hon Henry Neville, John Robinson, and Henry Shelley, Esqrs, The v John Wilkinson (1782) 28 ER 1 Bro CC 543 (refd)
Horace Brenton Kelly v Margot Cooper and another [1993] AC 205, PC (refd)
Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109, HC (refd)
Hussey v Palmer [1972] 1 WLR 1286, CA (refd)
Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145, FC (refd)
James, Ex parte (1803) 32 ER 385; (1803) 8 Ves Jun 337 (refd)
Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427, HC (refd)
Jones v Coxeter (1742) 26 ER 642; (1742) 2 Atk 400 (refd)
Jones and another v Lipman and another [1962] 1 WLR 832, Ch D (refd)
Jorden v Money (1854) 10 ER 868; (1854) 5 HLC 185 (refd)
Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116, FC (refd)

Keith Henry and Company Proprietary Limited v Stuart Walker and Company Proprietary Limited and another (1958) 100 CLR 342 (refd)
Keng Soon Finance v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, interveners) [1996] 2 MLJ 431, HC (refd)
Kerry v Carter [1969] 1 WLR 1372, CA (refd)
Kheng Chwee Lian v Wong Tak Thong [1983] 2 MLJ 320, FC (refd)
Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384, FC (refd)
Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805, SC (refd)
Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd [1990] 1 MLJ 304, HC (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94, FC (refd)
Krishna Kumar v United Malayan Banking Corporation Bhd [1983] 1 MLJ 106, HC (refd)
Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor [1993] 2 MLJ 289, SC (distd)
Lim Ah Hun v Pendaftar Hakmilik Tanah, Pulau Pinang & Anor [1990] 3 MLJ 34, HC (refd)
Lin Nyuk Chan v Wong Sz Tsin [1964] MLJ 200, FC (refd)
Littlewoods Mail Order Stores Ltd v McGregor (Inspector of Taxes); Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners [1969] 3 All ER 855; [1969] 1 WLR 1241, CA (refd)
Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53, FC (refd)
Markt & Co, Limited v Knight Steamship Company, Limited and another appeal [1910] 2 KB 1021, CA (refd)
Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd (in receivership) & Anor [2000] 3 MLJ 304, CA (refd)
Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196, HC (refd)
Mohd Latiff bin Shah Mohd & Ors v Tengku Abdullah ibni Sultan Abu Bakar & Ors and other actions [1995] 2 MLJ 1, HC (refd)
Mosbert Berhad (in liquidation) v Chatib bin Kari [1985] 1 MLJ 162, FC (refd)
New Zealand Netherlands Society 'Oranje' Incorporated v Laurentius Cornelis Kuys and another [1973] 1 WLR 1126, PC (refd)
Ng Kheng Yeow v Chiah Ah Foo & Ors [1987] 2 MLJ 330, SC (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224, FC (refd)
Oswald Hickson Collier & Co (a firm) v Carter-Ruck [1984] 2 All ER 15, CA (refd)
Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97, CA (refd)

Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25, SC (refd)
Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [1999] 3 MLJ 157, CA (refd)
Pinley, Gent, one, & c v Bagnall (1723) 99 ER 3 Doug KB 155 (refd)
R v Chief Metropolitan Stipendiary Magistrate, ex parte Osman [1988] 3 All ER 173 (refd)
R v Neil (2002) 218 DLR (4th) 671 (refd)
Rakusen v Ellis, Munday & Clarke [1912] 1 Ch 831, CA (refd)
Rasidin bin Partorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)
Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh [1997] 2 MLJ 373, CA (refd)
Rengamah a/p Rengasamy v Tai Yoke Lai & Anor [1998] 5 MLJ 260, HC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)
Soar v Ashwell [1893] 2 QB 390, CA (refd)
Spector v Ageda [1973] Ch 30, Ch D (refd)
Standard Chartered Bank v Yap Sing Yoke & Ors [1989] 2 MLJ 49, HC (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533, FC (refd)
Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (f) [1984] 1 MLJ 160, FC (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81, FC (refd)
Tan Sri Datuk Dr Mohan Swami & Anor v MISL & Associates Sdn Bhd (No 3) [2003] MLJU 414; [2003] 7 CLJ 482, HC (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2003] 4 MLJ 332, HC (refd)
Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)
Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265, CA (refd)
Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd [1984] 2 MLJ 313, HC (refd)
Tong Tai Holdings Sdn Bhd v Jimi ak Mantali & Ors [2003] 5 MLJ 450, HC (refd)
United Malayan Banking Corporation Bhd v Development and Commercial Bank (Ltd) Bhd [1983] 1 MLJ 165, FC (refd)
United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors [1976] 1 MLJ 169, FC (refd)
United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi [1984] 2 MLJ 87, PC (refd)
Van Laun, In re, Ex parte Chatterton [1907] 2 KB 23, CA (refd)
Voon Keng & Ors v Syarikat Muzwina Development Sdn Bhd [1990] 3 MLJ 61, HC (refd)

A *Wallersteiner v Moir, Moir v Wallersteiner and others* [1974] 1 WLR 991, CA (refd)

Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113, FC (refd)

B *Wong Leong Sing & Anor v Wong Tan Ann* [1989] 1 MLJ 99, HC (refd)

Yong Joo Lin Yong Shook Lin and Yong Loo Lin v Fung Poi Fong [1941] MLJ 63 (refd)

Legislation referred to

C Contracts Act 1950 s 24, 24(b)
Evidence Act 1950 s 101
Income Tax Act 1985 [CAN] s 18.1(15)(b)
National Land Code ss 214, 214A, 214A(1), (4)
Rules of the High Court 1980 O 15 r 12, O 59, O 59 r 1

D Stamp Act 1949 ss 51(1), 52 proviso (a)

DP Vijandran (NP Ramachandran with him) (NP Ramachandran & Associates) for the appellants.
Malik Imtiaz Sarwar (Bachan & Kartar) for the first and second respondents.

E *Leong Kok Keong (Kean Chye & Sivalingam) for the third respondent.*
S Ravichandran (Loo Chay Meng with him) (Abu Hassan & Associates) for the fourth respondent.
Ling Hua Keong (MH Wong with him) (Cheang & Ariff) for the fifth respondent.

F **Zainun Ali JCA:**

G **[1]** This appeal involves interesting issues, inter alia, those relating to the often tricky question of the extent in which a solicitor's relationship with his client becomes fiduciary.

[2] This appeal saw copious amounts of materials with 93 exhibits, 33 witnesses, 157 documents and close to 1,000 pages of notes of evidence, H making it appear more complex and formidable than it is.

[3] However out of the morass, in my view only three issues present themselves for consideration. They are:

I (a) whether the plaintiffs and others, ('plaintiffs and sub-purchasers') claiming to represent 213 others as original purchasers of the said land, retained an equitable right thereof, which was not extinguished despite the various subsequent dealings with the land;

(b) whether the first defendant acted as solicitor for the plaintiffs and thus

had purchased the said land as their trustee — that the purchase was not done by the first defendant in his personal capacity but on behalf of the plaintiffs; and

(c) whether this suit amounts to a representative action.

[4] The appeal before us is against the decision of Abdull Hamid J (as His Lordship then was) made on 23 January 2006, where His Lordship dismissed the claim of the plaintiffs after a full trial.

[5] As would be unfolded later, this appeal is fact-driven. In essence the plaintiffs claimed that they had an equitable interest in the subject land ('the land') and that the defendants had colluded with each other, to deprive them of their interest, causing them injury.

[6] The plaintiffs contended that the first and second defendants' action gave rise to a conflict of interest, since they were also solicitors for the plaintiffs, and by conducting themselves in the manner they did in this matter they had enriched themselves at the plaintiffs' expense. It is also the plaintiffs' contention that as the first defendant acted as their solicitor in this matter the relationship between solicitor and clients between them had in fact been established.

BACKGROUND

[7] Though the facts of this case appear to be a scramble of sorts, they can be unraveled and simplified in this manner.

[8] That firstly, Nam Bee Rubber Estate Sdn Bhd ('Nam Bee') was the initial registered owner of a piece of land measuring approximately 1,490 hectares held and title PN 35553 Lot No 9108 in the Mukim of Hutan Melintang Daerah Hilir Perak ('the said land'). Since it is rubber estate land, it was governed by, inter alia, s 214A of the National Land Code ('NLC').

[9] A company called Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPKB') established on 26 November 1979 and dealing in real estate, had a director called Reganathan ('SP8').

[10] According to SP8, SPPKB bought the land from Nam Bee, on or about 5 December 1979, where SPPKB paid a deposit totaling RM51,000 which also formed part payment of the purchase price of the land — (see P38).

[11] The price of the land was RM3.2m. Then for some incomprehensible reason, it was SP8's evidence that Nam Bee could not transfer the land to SPPKB. His contention was that Nam Bee was unable to do so on grounds that since SPPKB and Nam Bee had different or separate directors the transfer could only go through if Nam Bee establishes a subsidiary company. Thus Simpang Empat Plantations ('SEP') came into being, as Nam Bee's subsidiary company. Subsequently the directors of SPPKB became the directors of SEP. One such director was SP8.

[12] On 18 December 1981, a declaration of trust was executed between one Tan Ah Loong and SPPKB. The preamble of the said declaration of trust stated that Tan Ah Loong acted on behalf of Nam Bee.

[13] Preamble 'A' to 'G' of the declaration of trust set out the process by which the land owned by Nam Bee would be paid for by SPPKB and transferred into the name of a new company, ie Simpang Empat Plantation ('SEP').

[14] Subsequently both Nam Bee and SPPKB entered into another agreement (exh P45) which, inter alia, varied the terms of P38, setting out the procedure being followed.

[15] This was followed by both parties entering into yet another agreement (exh P41) which varied P45 where the time to pay the balance was extended.

[16] The sub-purchasers (some of whom were workers on the land) at the invitation of SPPKB, entered into 'non-standard' agreements with SPPKB, signed between them and SP8. These agreements ('the SPPKB agreement') were ambiguous due in part, to their varying nature. Some of the agreements were for purchase of the land, whilst others were for purchase of shares in the land.

[17] At that time, SEP had divided the land into 1,000 lots (out of the 3,000 acres). For the sale of shares, each share was pegged at 3 acres. Each lot was priced at RM10,500. Exhibit 4 indicates the agreement for the purchase of plots from SPPKB, while exh 5 indicates the agreement to take up shares in the said land.

[18] Under the agreement, SPPKB as the vendor undertook to develop and manage the said land into a palm oil estate within 48 months. The sub-purchasers are to participate in the produce from his plot/share in the land. Under the agreement, the sub-purchasers shall pay the balance sum within 48 months. According to SP8, there were altogether 585 sub-purchasers who entered into the agreement with SPPKB.

[19] In the course of things, SEP borrowed from both Maybank (RM500,000 in 1985 and overdraft of RM500,000) and also from MBf Finance, the fifth defendant, for RM2.5m with a charge and debenture created, unknown to the sub-purchasers.

[20] SEP was then unable to repay its loan to fifth defendant. Pursuant to the powers under the debenture, the fifth defendant on 12 May 1992 appointed receivers and managers ('R & M') from the firm of Ernst and Young.

[21] It is noted that in his application to Maybank for the bank loan in 1985 as adverted to earlier, SP8 admitted that he did not disclose the existence of the sub-purchasers on the land, in case it would jeopardise the said loan application. SP8 had also not been candid when he said that he had informed the sub purchasers that the said land was transferred to SEP. Thus when SP8 testified that the manager of fifth defendant, ie SD17 upon inspection of the said land had *seen* the sub-purchasers and upon inquiry, was told by him (SP8) that they were sub-purchasers SP8's testimony is dubious, since it contradicted SD17's evidence.

[22] Given SP8's propensity for being deceitful, his evidence that SD17 had seen and been told of the sub-purchasers on the land is not to be believed, albeit when SP8's evidence contradicted that of SD17's who testified he had not seen anyone on the said land.

[23] The R & M immediately managed SEP. The R & M through one Dato' Robert Lim ('SD12') found that SEP was bereft of any business activities and its debt was close to RM3.9m. In view of this SD12 then decided to sell the land. SD12 said that there was no response from the SEP directors when he wrote to them about this. SD12 referred to the sub-purchasers as 'squatters' and said that he knew nothing of their agreement with SPPKB, which he said, in any case had no connection whatsoever with SEP.

[24] The said land was advertised for sale by public tender. However only one offer came in and that was from the first defendant. The first defendant paid the R & M a deposit of RM400,000. However SP8 took out an injunction on the said land and the sale could not proceed. The order was later set aside and a second tender was advertised in early 1994. For the second tender, the only response also came from the first defendant. His bid was in his own name.

[25] The first defendant was successful in his bid and an agreement of sale of the land was signed by the first defendant with the R & M on 30 March

1993. The sale price was RM4.85m, which was sufficient to repay the loan in full and the fees due to the R & M, with a balance of RM20,000 which SD12 deposited with the fifth defendant since the SEP directors were uncontactable.

[26] The above in brief, is a general overview of the background to this appeal.

ISSUES

[27] Since the issues raised flowed from one to the next, I believe the starting point of this appeal is with regard to the status of SPPKB and subsequently, the plaintiffs and sub-purchasers. As had been recounted earlier, SPPKB purportedly 'bought' the land from Nam Bee. However there was no evidence of this, save for P38, where on 5 December 1979 SPPKB paid a deposit of RM51,000 to Nam Bee (see also P40, P41 and P45 where P40 was a trust instrument and P41 and P45 were variations thereof).

[28] The sub-purchasers were at pains to bring round the fact that the said documents indicated the process by which the land passed from Nam Bee as the proprietor, to SPPKB as the beneficial owner and then to SEP as the registered owner. The sub-purchasers contended that the process showed that SEP took the land with all the liabilities thereon as constructive trustee for SPPKB and the sub-purchasers.

[29] However my view is this. At the point when SPPKB (through SP8 as its director) entered into the varying agreements with the sub-purchasers, SPPKB was not the registered owner. This is because apart from P38, P40, P41 and P45, there was nothing in evidence to suggest or show that Nam Bee and SPPKB had entered into a sale and purchase agreement of the sale of the land from Nam Bee to SPPKB.

[30] Thus at best, SPPKB's interest in the land could only be beneficial. This is clear from the documents and evidence before us. Whilst there is evidence of a transfer of the land from Nam Bee to SEP, there was no such evidence of a sale or a completed sale, or a transfer of the land by Nam Bee to SPPKB (see the appeal record at pp 35–46). Whilst it is true that SPPKB and SEP shared a common director in SP8, this does not obscure the fact that SPPKB is not and never has been the said land's registered proprietor.

[31] In my view the learned trial judge was correct in his finding that P45 was to be disregarded since it was not a stamped agreement (s 51(1) of the Stamp Act 1949); and in the alternative, the learned trial judge said that no weight is to be given to the document as it was not signed for and on behalf

of Nam Bee. In any case the said document was adduced unexpectedly, by SP8, whom the learned trial judge had found to be untruthful (grounds pp 29 and 78 of the appeal record). A

[32] Even with the existence of a trust deed ('P40') and a receipt for part payment of RM51,000 from SPPKB to one Tan Ah Loong (P38–1765 R(1)) who is purportedly from Nam Bee, it was not entirely clear as to whether Tan Ah Loong acted on his own behalf or that of Nam Bee authorising the sale. Furthermore, the trust deed envisaged the execution of an agreement and was therefore subject to contract. To cap it all, the sub-purchasers did not call anyone from Nam Bee to testify. There was no company resolution by either SPPKB or Nam Bee tendered or enclosed to verify this important transaction. B C

[33] As observed by the learned trial judge, even if there was intended to be a sale, there was no evidence of the balance purchase price having been paid, for otherwise, cl 4 of the trust deed would have triggered, culminating in a termination of the agreement. When P41, a supplementary agreement ('P41') was executed, it only strengthened the fact that the balance of the purchase price had not yet been paid. D

[34] From this, several issues emerged. They include the question of the status of the sub-purchasers who bought plots of land and shares from SPPKB. The shares were pegged to a fixed acreage (ie 3 acres per share). The sub-purchasers went into the agreement, anticipating that they will eventually become owners of their respective plots, when all dues are paid to the vendors. E F

[35] But the question remains — whether the sub-purchasers had any equitable title in what they purportedly had purchased. Thus the question of the validity of those agreements ie whether title had indeed passed to the purchasers, becomes compelling. After all had been said and done, the learned trial judge found, inter alia, that SPPKB had no legal capacity as registered proprietor of the said land and thus had no authority to enter into the agreements with the sub-purchasers (see *Goo Hee Sing v Will Raja & Anor* [1993] 3 MLJ 610. Also *Wong Leong Sing & Anor v Wong Tan Ann* [1989] 1 MLJ 99). G H

[36] Shorn as it was of any legal capacity as the registered proprietor of the said land, it is my view that SPPKB is disentitled from entering into any agreement with the sub-purchasers or for that matter with anyone at all, selling them plots or shares in the land. In those circumstances, the question is, could valid title pass to the sub-purchasers? On the facts, it is my view, endorsing that of the learned trial judge's that no valid title had passed to them. I

[37] Strangely too, even though Nam Bee was described as a principal vendor in those agreements, Nam Bee was not a signatory to the said agreements.

[38] The said agreement also said nothing about SPPKB's obligation as 'vendor' to apply for the Menteri Besar's written consent (on the understanding that it was estate land); or that SPPKB had already applied for the said consent or indicating that such consent would be obtained despite restriction imposed in the title.

[39] A related alleged 'impediment' if it can be so called, is the fact that by virtue of the said land being classified as estate land, any fragmentation thereof would require approval from the estate land board (see s 214 of the National Land Code).

[40] Both parties cited authorities such as:

(a) *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [2002] 2 MLJ 399; [2002] 1 AMR 1201;

(b) *United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87; and

(c) *Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor* [1993] 2 MLJ 289.

in support.

[41] In *Kumpulan Sua Betong* the parties had agreed that they would apply to the estate land board for approval of the sale. But in that case, there was no 'fragmentation of the land' since it was not sold to 'two or more persons' as is the case in the instant appeal.

[42] In view of the background and legal position in the instant appeal, there is much to be said for the proposition put up by the fifth respondent that the parties in entering these agreements, attempted to circumvent the requisite legal obligation. It could, in that sense, be interpreted as an agreement where the subject is unlawful (see s 24 of the Contracts Act 1950) thus tendering such agreements prohibited.

[43] All the while, the plaintiff and sub-purchasers went to great lengths to prove the existence of a nexus between Nam Bee and SPPKB. They tried to do this by adducing a document which was initially marked as ID45. There was an earlier note that a submission on the question of admissibility would be heard. However that did not happen even though there was no evidence that the objection to its admissibility had been withdrawn. Somehow the said

agreement was admitted and was marked as P45. Since P45 was not stamped the first defendant objected and said that P45 could not be considered as evidence on grounds of its inadmissibility.

[44] In effect, SPPKB possessed no capacity to speak on behalf of SEP nor could it act on behalf of SEP as if SPPKB is the registered land owner in SPPKB's dealing with the Plaintiffs and sub-purchasers. It is irrelevant that SPPKB and SEP have common directors for the directors are not entitled to manipulate companies which are separate entities. Obviously the SEP assets do not belong to the directors themselves or SPPKB (see *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97).

[45] The end result of all these is that, valid title had not passed to the plaintiffs and sub-purchasers.

[46] As it was, the land was transferred to SEP. At first the plaintiffs and sub-purchasers claimed that they were unaware of even this fact, until an event occurred, whereby a default of loan repayment by SEP resulted in the land being put up for auction. However the plaintiffs and sub-purchasers claimed that their rights remained intact, based on the fact that SEP was formed purely as a device to obtain the Menteri Besar's consent and that SEP was merely taking over all the rights and liabilities of SPPKB in the land and is therefore a constructive trustee for SPPKB and the sub-purchasers. The plaintiffs and sub-purchasers went on to state that the sale had been fully performed and is thus completed.

[47] The plaintiffs and sub-purchasers contended that the evidence suggests that SEP had itself acknowledged its liability to the plaintiffs and sub-purchasers in their agreement with SPPKB; that SEP had taken over the responsibility in the agreements between plaintiffs and sub-purchasers and SPPKB.

[48] At the risk of repetition, it needs recalling that sometime in December 1990, SEP obtained credit facilities from the fifth respondent of RM2.5m to repay an earlier loan granted by Malayan Banking and further sums to enable rehabilitation of the said land. This was evidenced by a loan agreement dated 28 December 1990 in the fifth respondent's favour, secured by a chargee (Form 16A) dated 25 March 1991 over the said land in favour of the fifth respondent together with a debenture containing a power of attorney.

[49] The plaintiffs and sub-purchasers claimed that they were not notified of the loan and as well as the charge made by SEP, as alluded to earlier.

[50] They said they knew of all these only at the point of time of default by the third respondent in its repayment to the fifth respondent. The fifth respondent then appointed receivers and managers (R & M) over the third respondent. To make good its losses it was then decided to have the land sold by auction and due notices to that effect were published.

[51] In the meantime, a number of the sub-purchasers were unhappy with the turn of events when they heard about the impending auction and they then set up a protem committee. The protem committee decided to appoint a lawyer to assist them in their quest to get what they had paid for in their agreements with SPPKB.

[52] The lawyer in question was one Mr Gurbachan Singh s/o Bagawan Singh ie the first defendant. As regards the involvement of the first defendant and his capacity to act vis-à-vis the sub-purchasers, conflicting evidence arose from the plaintiffs and sub-purchasers and the first defendant himself, giving rise to several issues, the most contentious of which being the allegation made by the plaintiffs and sub-purchasers of the existence of a 'fiduciary duty' of the first defendant to them.

[53] The thrust of the plaintiffs and sub-purchasers case is this. That their rights flow from their status as the original sub-purchasers who bought their lots from SPPKB. That although there were various dealings on the land these have not affected nor extinguished their beneficial rights on the land. They are therefore entitled to such part of the land as they had individually purchased. Alternatively, the plaintiffs and sub-purchasers relied on the fact that the first defendant was acting as their solicitor and was therefore in a position of trustee where the land was purchased by him on their behalf in that capacity. In short they contended that the land was sold to the plaintiffs and sub-purchasers through the first defendant as their solicitor.

[54] The plaintiffs and sub-purchasers went further to state that SEP had in actual fact stepped into the shoes of SPPKB. SEP had also through a letter from Reganathan ('D14') at p 43 of AR 1 (appeal record C5-43) *testified* that SEP was fully responsible for the agreements made with SPPKB. The plaintiff contended that SEP thus took the land subject to the beneficial rights of the plaintiffs and sub-purchasers.

[55] It is also the plaintiff's case that the charge of the land to fifth defendant (in return for a loan taken by SEP) was ineffectual. The plaintiff's claimed that this was due the charge being 'bad' and the charge of the land to fifth defendant did not extinguish their equitable rights as beneficial owners.

[56] The plaintiffs contended that the transfer and registration of the land to the first defendant cannot override the equitable rights of the plaintiffs and sub-purchasers. The plaintiffs and sub-purchasers contended that they have shown how the land passed from Nam Bee as the proprietor to SPPKB as the beneficial owner and then to SEP as the registered owner. The plaintiffs contended that they had clearly shown how SEP had taken the land with all the liabilities thereon as constructive trustee for SPPKB and the sub-purchasers.

[57] The plaintiffs argued that as such, SEP is a constructive trustee for SPPKB and the plaintiffs and sub-purchasers, since SEP was merely a vehicle through which SPPKB acquired the property.

[58] The plaintiffs alternative claim in their application refers to the solicitor and client relationship where it was contended that the first defendant acted as their solicitor and was therefore in a position of a trustee. They further contended that the land was bought on their behalf in that capacity.

[59] The plaintiffs contended that the first defendant had attempted to confuse the issue by vacillating from one fact to the next. Whatever it was, it is the plaintiffs' case that the first defendant's conduct and the existence of independent and contemporaneous documents were more than enough to establish the existence of a solicitor and client relationship which is fiduciary in nature.

FINDINGS

[60] In my view after perusing through the mound of notes, cause papers and the judgment of the learned trial judge I found that the approach taken by the learned trial judge in determining this case was well within his competence.

[61] The issues highlighted and findings made by the learned trial judge were put across in the manner below:

(a) Whether the plaintiffs had an equitable interest in the land. On this question the learned trial judge made a finding of fact that SPPKB not being the registered owner did not possess legal capacity to sell the land to the sub-purchasers. This is borne out by there being no evidence of a sale or transfer of the land by Nam Bee to SPPKB. The learned trial judge excluded exh P45 as he was entitled to do since it was an unstamped agreement. In any case since it was not signed for and on behalf of Nam Bee and did not bear the seal of the company. Thus the

learned trial judge gave no weight to the said document. I find that the said approach by the learned trial judge to be correct.

(b) Even if there was a trust deed and receipt of payment from one Tan Ah Loong ('P38') it was unclear as to whether Tan Ah Loong was acting for himself or for and on Nam Bee's behalf. There was no company resolution of Nam Bee to prove that approval had been given to Tan Ah Loong to undertake this task. No one from Nam Bee was called to testify. In any event the said trust deed contemplated the execution of an agreement and was therefore subject to contract. There was no evidence of such contract.

(c) That there was no evidence of the payment of the balance of the purchase price. Note that the price of the land was RM3.2m. The payment by SPPKB to Nam Bee totaled up to a mere RM51,000 and no other evidence as to the balance being made. Thus the question is: was there an intended sale? If so, cl 4 of the trust deed would trigger, in the absence of balance of payment. Then again, the presence of a supplementary agreement strengthened the argument that the balance purchase price had not been paid.

(d) The above fact is bolstered by the fact that for any intended dealings, the consent of the Menteri Besar need be obtained. However, since the balance purchase price had not been paid, the procurement of such consent did not arise. The bottom line of all these facts is this: that bereft of a legal capacity as the registered proprietor the said land, how could SPPKB enter into agreements with the sub-purchasers, purportedly to sell plots or even shares in the said land? How could it pass any valid titles to the Plaintiffs and sub-purchasers? If the plaintiffs and sub-purchasers had thought that by tying D3 to Nam Bee and D3 to SPPKB, they had clothed SPPKB with a legal capacity to enter into any contract (such as these agreement with the sub-purchasers) then they had clearly misconceived the legal position and the legality of the whole transaction.

(e) That both SPPKB and D3 were separate legal entities and the question of lifting the corporate veil did not arise since it was not the pleaded case of the SPPKB that it had incorporated D3 to assist SPPKB in its attempt to avoid its legal obligations to the plaintiffs. Moreover there was nothing in evidence to show that the third respondent was a trustee of the land for SPPKB and by extension, the sub-purchasers.

(f) That the SPPKB agreement had the effect of fragmenting the land which is not allowed without there being an approval by the estate land board (s 214A of the National Land Code). In this case, no such consent or approval from the estate land board had been obtained. The parties to the said agreement appear to want to circumvent s 214A of

the National Land Code, rendering the SPPKB agreements void under s 24(b) of the Contracts Act 1950 (see the Federal Court decision in *Kumpulan Sua Betong v Ezan Sdn Bhd & Anor* [1993] 2 MLJ 289 and *Rengamah a/p Rengasamy v Tai Yoke Lai & Anor* [1998] 5 MLJ 260). Counsel for the plaintiffs submitted that s 214 of the National Land Code does not prohibit such contractual agreement of sale but conceded that before they can be registered in the individual names of the buyers, they must have the consent of the estate land board.
The learned trial judge took the view that a sale of part of an estate land purportedly to transfer the land for the completion of such sale would initially be voidable at the instance of the consent of the estate land board. The learned trial judge observed that there was no mention of this legal requirement in the agreements, nor was it agreed upon by the parties as pre-conditions to the agreements. No evidence had been shown too, that steps had been taken to obtain the said consent post agreements.

Kumpulan Sua Betong could be distinguished, in that the parties had agreed that they would apply to the estate land board for the approval of the sale. In any case, in *Kumpulan Sua Betong* there was no fragmentation of the land since it was not sold to 'two or more person'. The absence of any clause by the parties to make those agreements subject to the consent of the estate land board can lead this court to assume that an unlawful object was being undertaken and is void under s 24 of the Contracts Act.

I agree with the learned trial judge on all the above findings he made above.

(g) The fact that the R & M was validly appointed had not been rebutted despite the defences put up. Thus the R & M was validly appointed pursuant to a valid debenture on the default of third respondent.

[62] I agree with the learned trial judge's finding in item (g) above, including the fact of the land being auctioned by the R & M being valid.

[63] As regards whether the fifth defendant qua debenture holder had notice of the purported interests of the sub-purchasers, three witnesses had given evidence ie SD17 (manager of fifth defendant) SP8 and SD12 (R & M). SD12 testified that he had thought that the sub-purchasers were squatters. The learned trial judge found SD12 to be 'solid and sincere' and that the reliability of his evidence is unquestioned.

[64] There is no reason for me to disagree with this finding of fact.

A **[65]** The learned trial judge had also found, as I now do, that the plaintiffs had not established fraud on the part of any of the relevant parties. In the circumstances as mentioned above, the learned trial judge had correctly analysed the issues and in coming to the above conclusion, had not misdirected himself.

B

[66] Thus in the light of the above, my view which endorses that of the learned trial judge's is that, it is not open to the plaintiffs' to now declare that they have either an equitable or beneficial interest, since the land was sold to the first defendant by way of a public auction undertaken by the fifth
C defendant who enjoyed an unequivocal, indefensible charge over the land. Thus I agree with the learned trial judge that the court should not allow the lifting of the corporate veil in determining the plaintiffs' interest in this case, as the corporate personality of the company should remain intact and ought not to be controlled in this manner.

D

[67] With regard to whether the action of R & M in selling off the land had affected the plaintiffs' and sub-purchasers rights, it is my view that it had not. From the testimony of SD12 the R & M had merely undertaken its legal obligations to realise the third defendant's assets since the duty of the R & M
E includes the disposal of assets. The R & M are certainly not the agents of the directors of third defendant and part of the duties of the R & M is to dispose off assets of the company.

F **[68]** As authorities such as *Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd (in receivership) & Anor* [2000] 3 MLJ 304 have shown, the Court of Appeal held that a receiver and manager have unfettered powers to sell land pursuant to the document of security (in the instant appeal, the debenture dated 12 March 1991).

G

[69] The *Melantrans* case is distinguishable on its facts from the *Kimlin* position (see *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805.

H

[70] In that regard, the R & M in this appeal in proceeding with the sale by way of tender had acted well within its power.

[71] With regard to the stand taken by the third defendant, its counsel
I submitted that to begin with, the registered title of the land did not reflect the plaintiffs as having any interest in the land.

[72] Secondly, that the tender submitted by the first defendant was made in his personal capacity. This is reinforced with the evidence of the R & M

(for the third defendant) entering into a sales and purchase agreement with the first defendant in that capacity, with the R & M acting as agents for the third defendant.

[73] The evidence of SD12 is very crucial in determining the solicitor-client relationship made much by the plaintiffs. This was what SD12 said:

> At the second sale only one tender was opened. I or any of the R & M did not conspire with Gurbachan Singh to defraud any of the purchasers. Gurbachan Singh did not offer any benefits or gains to any of the R & M. On the first tender, the bid was made by Gurbachan in his own name. For the second tender, I believe also in his own name ...

[74] It was the plaintiffs and sub-purchasers' contention that on 30 August 1992, the first defendant had informed them (as evidenced in PW11's (Ramachandran's) testimony) that he (first defendant) had come to the meeting held at SP8's office as their lawyer. According to PW11, the first defendant said that the auction will not go on as a cheque for RM3.5m ('D15') had been made out to pay for the loan. PW11 said the first defendant gave those present at the meeting a letter (exh D14) which states that as their lawyer, the agreement with SPPKB will be transferred to a new agreement under the third defendant's name, though the first defendant did not say anything about the transfer of the land. The testimony of PW11 above was confirmed by a witness called Muniandy, PW14.

[75] PW14 testified that the first defendant told him that he (the first defendant) will put in a bid 'on behalf of the sub-purchasers'.

[76] PW14 said that however the first defendant put in the bid for the land in his own name and told PW14 that in an auction it is not possible to bid in various names (of the sub-purchasers). PW14 testified that he was asked by the first defendant to send a letter (exh P62) from his office (the second defendant) to the R & M. PW14 did not send the letter since he was not happy with its contents which purportedly indicated that fresh agreements will have to be made by the sub-purchasers with the first defendant to buy the property from him and to pay the balance of the purchase price to SPPKB. But as far as the sub-purchasers were concerned, nothing more was owed by them to SPPKB.

THE POSITION TAKEN BY THE FIRST AND SECOND DEFENDANTS

[77] The first defendant on the other hand took the position that in so far

as his relationship with the plaintiffs and sub-purchasers were concerned he had only a limited retainer to act on behalf of some individuals of the protem committee to only enter caveats and to inquire into the nature of the rights of the R & M over the land in view of the impending sale of the land by the R & M. The first defendant said that in fact some of the sub-purchasers including SD7 had asked him to put in the bid. According to the first defendant the sub-purchasers had been given the impression by SP8 that the third defendant would settle outstanding amounts to the fifth defendant. However this did not happen. Thus the auction had to be proceeded with.

[78] The first defendant successfully bidded for the land but the auction was aborted when SP8 obtained an injunction, thus grinding the whole exercise to a halt. Therefore a second auction had to be called.

[79] According to the first defendant, in the first auction he had openly declared to all and sundry the position he was taking that he (the first defendant) will bid in his personal capacity but had every intention of helping the plaintiffs and sub-purchasers to complete their agreements with SPPKB (as if the first defendant had stepped into the shoes of SPPKB). He would then allow the sub-purchasers to buy the land at the original price (under their respective SPPKB agreement) less what had already been paid for by them to SPPKB.

[80] The first defendant said that he told the plaintiffs and sub-purchasers that if any of them had fully paid up, then the first defendant will accept a nominal amount of RM1, on the basis that they had in fact entered into agreements with SPPKB and that they had paid monies accordingly.

[81] Insofar as the first defendant was concerned, he was not acting for any of the sub-purchasers in the first auction.

[82] The first defendant said the same position as above was taken by him in the second auction. The only difference being that in the second auction, the first defendant sought contributions from the sub-purchasers for the deposit. The first defendant said he made it clear to the sub-purchasers in both the first and second auction that should there be any excess land after the sub-purchasers had taken up their lots; he would retain the excess land for himself.

[83] When the R & M advertised for a second auction, they sent a tender form to participate to the first defendant seeing that he was the sole bidder for the aborted first auction.

[84] It was the first defendant's evidence that he was not interested to bid for the second time around, due to adverse comments made about him in his involvement in the first auction.

[85] However sometime towards the end of January 1994, one Mr Vellasamy (the first plaintiff who was the chairman of protem committee) and a few others sought the first defendant out and persuaded him to take up the second bid.

[86] They said that they will undertake to enter into fresh sale and purchase agreements with the first defendant if his bid was successful.

[87] The first defendant agreed to the proposal but only if they agreed on his terms. The first defendant put down his terms in written form which he prepared in the presence of the first plaintiff and the two Tans.

[88] Another meeting was held with the sub-purchasers at Simpang Empat. At this meeting the first defendant explained to them the reason why he is making the second bid. The first defendant impressed upon them that the second bid was conditional upon the sub-purchasers indicating their interest to him to buy back their respective plots. The content of the letter written by the first defendant to the protem committee read as follows:

BACHAN & KARTAR ADVOCATES & SOLICITORS

29th January 1994

The Protem Committee of Sub Purchasers of Land

Known as Lot No. Pt 125

Mukim of Hutan Melintang Perak

from Simpang Empat Plantation Sdn Bhd

Dear Sirs,

Re: Sale by Tender of Land known as Pt 125 Mukim of Hutan Melintang, Perak

We refer to the above matter and to the meeting at our office between members of your committee and our Mr. Gurbachan Singh recently. At this meeting members of your committee suggested that our Mr. Gurbachan Singh make a bid for the tender of the above land which is being auctioned by way of tender.

Our Mr. Gurbachan Singh is prepared to consider making the tender on the following conditions:

(a) The tender would be in the name of our Mr. Gurbachan Singh;

(b) The tender would be made at the price of RM4.1 million;

(c) A sum of RM200,000.00 be raised by our Mr. Gurbachan Singh as part of the 10% deposit payable at the time of the tender;

(d) A sum of RM200,000.00 to be raised by the sub-purchasers.

(e) If the tender is successful the balance of the purchase price amounting to RM3,699,000 million is to be paid within 3 months from the date of signing of the agreement;

(f) The authentic sub-purchasers, who must prove that they are genuine sub-purchasers by way of producing the sale and purchase agreement together with good and proper receipts of payments of the purchase price paid to Simpang Empat Plantation Sdn Bhd (SEPSB) would allowed to purchase the portions of the land earlier purchased by the sub-purchased from SEPSB at the purchase price to be mutually agreed between such sub-purchaser and our Mr. Gurbachan Singh;

(g) Our Mr. Gurbachan Singh if successful in the tender would only deal with the genuine sub-purchaser and no one else;

(h) The genuine sub-purchaser must pay their proportion of the purchase price and enter into a fresh sale and purchase agreement within 1 month from the date of the tender being accepted upon terms and conditions to be agreed;

(i) All the sub-purchaser who have entered private caveats would withdraw the private caveats within 2 weeks of the tender of our Mr. Gurbachan Singh being successful;

(j) The sub-purchaser would be given the opportunity to purchase their respective portions purely on humanitarian grounds but without any legal obligation to sell to the sub-purchaser the portion of the land earlier purchased by them from SEPSB;

(k) The sub-purchaser would support the bid of our Mr. Gurbachan Singh.

Yours faithfully,

Sgd.

We agree to the above.

Sgd.

Vellasamy a/l Pennusamy.

[89] Clearly, the intent and purpose of the above letter is obvious.

[90] On the next day ie 30 January 1994, the first defendant had a meeting with the sub-purchasers since he was thinking of bidding at RM4.1m and so it was crucial to gauge the intention and interest of the sub-purchasers as regards the land. In the said meeting held on 30 January 1994 it was apparent from the minutes that the first defendant had told the sub-purchasers in no uncertain terms that should he make the bid, they have to enter into fresh agreements with him and pay the balance due under their respective agreements they entered with SPPKB within three months since that would be the time limited for payment if his bid was successful.

[91] The first defendant also briefed the sub-purchasers on the impediment which they could face, in that since the said land was estate land and no approval was forthcoming, he (the first defendant) would form a company to which the said land would be transferred. Thereafter the sub-purchasers would have to enter into fresh agreements with the said company to hold shares in the company, failing which they would lose their plots or shares in the land.

[92] In view of the varied and varying sums, which had been paid by the sub-purchasers to SPPKB (where some had paid nothing more than the deposits whilst some others had almost paid up the entire sum) it was then not possible for all of them to share the bid price.

[93] Thus on 4 February 1994, the first defendant made a bid for the land at RM4.5m. The first defendant had persuaded two friends who had joined him in the first bid, to do the same in the second bid. The bid was increased to RM4.85m at the behest of Dato' Robert Lim to which the first defendant agreed.

[94] At a subsequent meeting with the sub-purchasers, the first defendant indicated that he did not consult or obtain the consent of the protem committee in making the bid, on the simple ground that it was a personal bid. He went on to say that he was not appointed by the protem committee to make the bid.

[95] The result of the bid came on 7 March 1994 where the R & M informed the first defendant that his bid was successful. The first defendant then indicated to the fifth defendant and the R & M that he would enter into fresh sale and purchase agreements with the sub-purchasers. This is exemplied in a letter written to sub-purchasers dated 17 March 1994 ('D74'), followed by the agreement at exh D73.

[96] The letter of 17 March 1994 which is self-explanatory is appended below:

> 17th March 1994
>
> Dear Sir/Madam,
>
> Re: Your purchase of a portion of land from Syarikat Pembinaan Perusahaan Kemajuan Berhad in respect of land held under Lot no. 6860 Mukim of Hutan Melintang.
>
> I wish to inform you that my tender for the above mentioned land has been successful and I have signed an agreement for the purchase of the abovementioned land on 16/3/94.

I understand that you were a subpurchaser under an agreement entered into between you and Syarikat Pembinaan Perusahaan Kemajuan Berhad (SPPKB).

On humanitarian and sympathetic grounds I am prepared to recognise you as a subpurchaser of the lot/lots purchased by you PROVIDED you comply and do the following:

(a) Produce the original stamped copy of our sale and purchase agreement;

(b) Produce the stamped original of the receipts of payment of deposits, installments or part payment made by you;

(c) Execute a fresh sale and purchase agreement with me on or before 3/4/94;

(d) Pay a deposit and part payment of a sum of RM2,000/- per lot of 3 acres each on the day the sale and purchase agreement between you and me is signed;

(e) You will be required to pay your balance purchase price within one (1) month from the date of the sale and purchase agreement between you and me;

(f) The purchase price of the sale and purchase agreement between you and me shall be the balance purchase price payable by you to S.P.P.K. Bhd. under your agreement within them. In the event of any dispute at to the balance the Vendor shall guided by the schedule of payment made which is in the possession of the Vendor;

(g) You are to produce 3 photocopies of your Identity Card together with 3 photocopies of the Change of Address card;

(h) You would be required to execute an irrevocable Power of Attorney to me limited for the purpose of doing all acts and things and executing all relevant documents for all purposes relating to and connected with this agreement;

(i) You shall pay a sum of RM500/- per lot of 3 acres each on the day of signing of the sale and purchase agreement towards fee, duties, disbursement, costs, expenses stamp duty, registration fee, quit rent, rates, assessments, solicitors fee and or all other charges;

(j) If you have paid any amount earlier to Messrs Bachan & Kartar such amount shall be taken and credited as payment of the balance purchase price;

(k) You will be required to pay the deposit and part payment towards the purchase price by way of crossed bank drafts in favour of Messrs Bachan & Kartar, Adcovates & Solicitors, No. 31A, Jalan Dato Maharajalela, 30000 Ipoh, Perak.

(l) For convenience you should immediately upon receipt of this letter write and inform my office at the address stated above in writing together with documentary evidence of the number of lots purchased by you, the purchase price, the amount paid and the balance purchase price so that I can prepare the sale and purchase agreement for execution;

(m) You are to obtain a separate crossed bank draft also in favour of Messrs Bachan & Kartar for RM500/- per lot of 3 disbursements, rates charges etc;

(n) I shall be most grateful if you could kindly inform other co sub purchasers of the same land of this matter and invite the co subpurchasers to attend the meeting scheduled for 2nd and 3rd April 1994 at SRJK (TAMIL) Simpang Empat, Hutan Melintang at 10.00 a.m.

(o) If you know of other co subpurchasers address please let me know immediately so that I can communicate with them;

(p) If you do not execute the sale and purchase agreement on or before 3rd April 1994 I will have no choice but to take it that you are not interested to comply with requirements of this offer letter and all your interest in the portion purchased by you will be forfeited and will vest in me. This is because I am required to pay the balance purchase price within (3) months from 16/3/1994.

I must impress upon you that in your own interest you must act fast and decisively. Should you decline to accept this offer and should you fail to execute the sale and purchase agreement and make all the payment stated above on or before 3/4/1994 I shall take it that you are no longer interested to protect your interest and that you decline this offer by me.

You are of course at liberty to call at my office to execute the sale and purchase agreement and to make the requisite payments as stated in this letter before the 3rd day of April 1994 in the event the 3rd April 1994 is not suitable to you.

I must also state that your interest in the portion purchased by you is personal to you and no sale, assignment, disposal, transfer or dealing of whatsoever nature with any third party will be recognised by me.

In the event that the original subpurchaser has passed away I shall recognise the lawful heirs and beneficiaries of the deceased should such heir and beneficiaries be agreeable to accept this offer and comply with the requisites of this offer letter within the stipulated time as contained in this letter.

I shall be glad to have your response in writing immediately upon receipt of this letter in view of the urgency of the matter and the shortage of time.

I wish to thank you and look forward to your co-operation and response.

Yours faithfully.

Sgd.

(GURBACHAN SINGH S/O BAGAWAN SINGH).

[97] In the processing of writing and informing the 741 sub-purchasers according to the list in P42, the first defendant then later found out that the payments and balances were incorrect.

[98] There were about 150 sub-purchasers who responded to the first defendant's notification. On 17 March 1994, the first defendant wrote to the sub-purchasers asking to produce the original stamped copy of the agreement and advised them to enter into fresh sale and purchase agreements and pay him the balance by 3 April 1994.

A **[99]** A meeting of the sub-purchasers was called for on 3 and 4 April 1994 which saw 217 of people attending. These 217 were the rest of the sub-purchasers who were the unnamed plaintiffs in this appeal.

B **[100]** It was first defendant's testimony that at this meeting he had practically pleaded to the sub-purchasers to take their respective plots back since they had so much more to lose should they fail to do so.

C **[101]** The 17 March 1993 letter and the oral plea by the first defendant to the plaintiffs and the unnamed sub-purchasers where the first defendant prompted and pleaded them to take back their plots as evidenced in the 3 April 1994 meeting (which remained unchallenged by the plaintiffs), reinforced the belief in the bona fides of the first defendant.

D **[102]** By then the first defendant had already paid a deposit of RM485,000 to the R & M, out of which the sum of RM276,450 was paid by some of the sub-purchasers. The first defendant arranged for loans from a couple of banks to help pay the balance. However by that time the relationship between the first defendant and the plaintiffs' had deteriorated, resulting in the plaintiffs entering a registrar's caveat and a few private caveats on the land.

E

[103] Some of the committee members argued with the first defendant on the question of whether they actually participated in sharing in the bid price. They disputed the bid price which they claimed was RM4.01m and not RM4.85m.

F

[104] The second cause for dispute was the reluctance of the sub-purchasers in proportionately taking on portions of the land which are still undeveloped where they are mostly shrouded in heavy jungle vegetation.

G

[105] However 43 sub-purchasers had already by that time, entered into fresh sale and purchase agreements with the first defendant.

H **[106]** The disputing sub-purchasers retained a solicitor, one Mr Vadiveloo to seek extension of time in which to pay the balance, which was agreed to by the first defendant.

I **[107]** Negotiations were on-going with members of the protem committee and by agreement the first defendant again extended the time to pay to 20 June 1994.

[108] By and by, 39 out of the 43 sub-purchasers managed to sell off their plots at RM8,000 per acre. The other four asked for RM16,000 per acre for their plot and they were able to do so at that price.

[109] An interesting point in this matter relates to the sub-purchasers' state of mind generally. The first defendant said that the second plaintiff had no problem with him and that they had seen him before and even after this suit was filed. According to the first defendant, the second plaintiff told him that he was misled when he did not enter into a fresh sale and purchase agreement with the first defendant; he said that his solicitor had indicated that his land had to be sold off. However he said, the purchasers of the other plots would only consider purchasing it at the market price. Since the second plaintiff's evidence was not rebutted it remained uncontradicted.

[110] The above evidence strengthened the notion that the confused state of mind of most sub-purchasers then was mirrored in the bewilderment manifested by the second plaintiff, with regard to their position of the plots of land they had agreed to buy from SPPKB.

[111] The first defendant managed to sell the remaining balance of 321 acres (another 360 acres sold to 39 sub-purchasers). Even then, the first defendant continued to be inundated with letters from the sub-purchasers offering to buy back their land *after* the expiry of the offer period. Naturally the first defendant informed them that he was no longer in a position to accede to their request.

[112] In the meantime the R & M was informed by the Pengarah Tanah dan Galian that in a force-sale situation such as a public auction by the R & M in the instant case, the restriction in interest placed upon it, ie requiring the Menteri Besar to consent for a transfer did not arise as it was not necessary in that circumstance (see D13's evidence).

[113] The registrar's caveat was removed, which according to SD13 was done since there was no order of court to extend it and there was no government interest for it to continue.

[114] Thus the land was subsequently registered in the name of the fourth defendant (Regal).

[115] It must be taken note of that the first defendant underwent a rigorous cross-examination taking up a whole fortnight when it finally completed.

[116] Yet, despite the rigours he went through, the first defendant remained unshaken and unfazed in his evidence. In this, I see no reason whatsoever to disturb the findings of the learned trial judge who affirmed the correctness of the first defendant's evidence.

[117] In confirming the correctness of the first defendant's conduct in the entire episode, the learned trial judge found favour with the approach taken by the first defendant as manifested in his testimony (at p 415 of the notes of evidence) where, inter alia, the first defendant said:

> J: I did as a solicitor write letters stating that I was acting for sometimes the committee and sometimes for sub-purchasers but I wrote those letters at the request of the committee or some members of the committee but not whilst I was appointed by individual members of the committee.
>
> While writing the letters I acted as their lawyer and conducted myself as a lawyer insofar as writing those letters. Yes I represented myself as their solicitor only insofar as I wrote their letters as well as when I was consulted on their problems, I did give legal advice. Yes. Particularly the first time when the first group came to see me.

[118] Though the first defendant admitted that when he entered the private caveats it was for the sub-purchasers, the first defendant stated that on 2 October 1992 he had informed Dato' Robert Lim (SD12) of the R & M, that he made the bid for the land for himself and not on behalf of sub-purchasers.

[119] The above fact was confirmed by SD12, in that the first defendant made the bids in his own name for both tenders.

[120] However two letters (P28 and D110) in which it was stated that the first defendant made the bid on behalf of 741 sub-purchasers were denied by the first defendant. The first defendant said that the fact is untrue. This letter was written, not by the first or even the second defendant, but by the R & M itself.

[121] And during the cross-examination of SD12 by the first defendant, SD12 conceded that whoever drafted the letter for the R & M could have been mistaken that the first defendant was making the bid on behalf of sub-purchasers, especially after seeing all the other letters (pp 798–799 of the notes of proceedings).

[122] The first defendant testified that he did not collude with SD12 and neither did he take directions from SEP. The first defendant's version of

events above was accepted by the learned trial judge. I see no reason here to intervene with the learned trial judge's decision.

[123] What is of importance is that the first defendant's main responsibility was in the due conduct of the receivership.

[124] I agree with the learned trial judge that from the notes, SD12 had come across as an independent and truthful witness and his evidence corroborated that of the first defendant when the first defendant asserted that the bids were made by the first defendant in his own behalf and not that of the sub-purchasers. That it was the evidence of SD12 that the R & M had regarded the sub-purchasers, as nothing more than squatters.

[125] As could be seen, the better part of the first defendant's cross-examination by the plaintiffs' counsel dwelt largely on the first defendant's role in acting as solicitor for the sub-purchasers in making the bids for the said land.

[126] I had made a thorough appraisal of the evidence of the first defendant, and after taking into account relevant and related documents, the learned trial judge found that the bids on both the tenders of the land were made by the first defendant in his personal capacity for his own advantage. The learned judge also though the first defendant admittedly acted as a solicitor for some of sub-purchasers, this did not in any way directly relate to making the bids on the land.

[127] The above finding is correct and I do not see any reason for me to interfere with it.

[128] I also accept and agree with the finding of the learned trial judge that the fifth defendant was an innocent chargor without notice of the agreement between the sub-purchasers and SPPKB and their 'interest' in the land.

[129] According to the trial judge, the evidence of the other defence witnesses corroborated and supported the testimony of the first defendant. In the absence of any contradiction and discrepancy I find no reason to interfere with the learned trial judge's finding.

[130] However it is the plaintiffs' alternative submission which gave the more crucial dimension to this appeal. The plaintiffs claimed that the first defendant had been their solicitor and that consequently a fiduciary relationship had been created.

[131] The facts lending to the involvement and engagement of the solicitor (the first defendant) and the plaintiffs, and other sub-purchasers had been alluded to earlier.

[132] To briefly recount, it was SP4's testimony that she authorised the fourth plaintiff to file this suit but she said she had never appointed the first or second defendant as solicitor.

[133] An officer from the registrar of title department, SP6, testified that the said land was never registered in SPPKB's name.

[134] A civil suit brought against SPPKB by one of the sub-purchaser ie SP9 in the Teluk Intan Magistrates' Court successfully resulted in the refund of the moneys he had paid to SPPKB. In so testifying he said he did not personally appoint the first defendant as his lawyer but that it was the committee which appointed him.

[135] As regards SP11, I will be hard put to accept his testimony. SP11 had at first testified that he attended the meeting of 30 August 1992 and claimed to have seen the first defendant whom he said came as a lawyer, telling the sub-purchasers not to worry. SP11 went on to say that at a subsequent meeting with SP8 the first defendant showed them a cheque for RM3.5m.

[136] According to SP11, the first defendant told them that SP8 had assured them that the sale of the land will not take place.

[137] During the cross-examination of SP11, he claimed that he knew nothing of the first bid. The learned trial judge made a finding that the facts as recorded in the minutes of meetings as manifested in D72, D78 and D80 tell their own tales and therefore the allegations made SP11 under cross-examination were therefore suspect, being contrary to the contemporaneous documents.

[138] Another doubtful witness was SP14. What SP14 testified as regard the role of the first defendant, contradicted the testimony of defence witnesses and documents adverted to earlier especially the letter ('D71'), where there was no such indication that the first defendant was representing the sub-purchasers.

[139] In fact D71 was made for the second bid where SP14 acknowledged having received it. The learned trial judge found that SP14 came across as being untruthful and unreliable and thus rejected SP14's allegation that the first defendant acted as the sub-purchaser's lawyer.

[140] In my view, the entire episode was in the main, due to misapprehension and misconception on the part of the sub-purchasers that the first defendant was acting on their behalf as their lawyer. **A**

[141] Statements such as that given by SP12 that 'we always thought that Mr Bachan was our lawyer' reflect the very thought of the sub-purchasers. **B**

[142] It did not help either that the plaintiff's counsel kept referring to P82 (a letter written by the R & M dated 28 September 1992) where the R & M had referred to the first defendant's letter to the R & M dated 14 September 1992 ('D69') in which the R & M had (mistakenly) said that the *bid was made by the first defendant on behalf of the 741 sub-purchasers*. (Emphasis added.) **C**

[143] Seeing as how it was Suppiah (SP13) who had drafted P82 which he claimed was based on D69 and that he retracted that statement during cross-examination, it would certainly be imprudent to have relied on SP13's evidence. **D**

[144] This is simply on the ground that D69 *letter did not make any mention that the bid was made by him on behalf of the sub-purchasers*. **E**

[145] All that was said in D69 was that *the bid was made by first defendant with the blessing of the sub-purchasers.* (Emphasis added.) (Remember that sub-purchasers and first defendant had agreed that the first defendant was to make the bid and that they will soon after, enter into fresh sale and purchase agreement with him). There were not much protestations by the sub-purchasers at this arrangement. In fact the sub-purchasers knew that that was the best option at the material time. **F**

[146] One can well understand SP13's hostile response to questions put to him since there were allegations of demands made by him to first defendant for compensation, which was understandably refused by first defendant. **G**

[147] The plaintiffs had also submitted that the letter of P82 gave clear indication of the collusion between these three defendants. **H**

[148] To add to the plaintiffs' woes, SP12 in his evidence had stated that the first defendant had told him that he was making the bid personally and that there was no collusion between the first defendant and the R & M. **I**

[149] SP12 went on to testify that D69 made no mention that the first defendant was representing or bidding on the sub-purchaser's behalf. The learned trial judge accepted SP12's evidence.

[150] In the light of the above, the learned trial judge accepted the evidence given in the first defendant favour and indicated his rejection of the tainted evidence of SP13 as well as the evidence of SP4 and SP13.

[151] I could not agree more with the learned trial judge. I see no reason whatsoever to interfere with his findings above.

[152] One other important witness was SP14 who claimed to be chairman of the protem committee. However according to SP7, SP14 was not even a member of the protem committee on 30 August 1992 at the time when SP7 and the first defendant met up with SP8. SP7 went on to say that in the several meeting held by the protem committee prior to the first auction on 8 September 1992, SP14 was not in attendance at any of the said meetings. This fact puts paid to SP14's claim of being chairman of the protem committee then.

[153] The learned trial judge had warned himself of the lack of probity on the part of SP14. SP7 on the other hand, being a protem committee member, had dealt extensively with the first defendant and knew the details of both tenders. Despite the problems (largely self-imposed) faced by SP7 with regard the dealing of the land with first defendant, SP7 nevertheless informed that at the meeting with SP8, the first defendant never represented himself as a lawyer for the sub-purchasers.

[154] Thus the plaintiffs' counsel's contention that the first defendant stood in a fiduciary position vis-à-vis the plaintiffs and sub-purchasers need be looked at with seriousness.

[155] The plaintiffs' counsel submitted that the first defendant's position in the entire episode, bidding the land in his name whilst there exist a solicitor-client relationship, necessarily implies that the first defendant stood in a fiduciary position with the plaintiffs and sub-purchasers.

[156] And that if a conflict arises between a duty to himself and that of his client, the first defendant as solicitor acted as trustee for any and all beneficiaries arising from his dealings with the property. The plaintiffs' counsel went on to say that in view of the trust reposed in the first defendant and the element of dominance and undue influence he had over the plaintiffs and sub-purchasers, it is not open for the first defendant to avail himself of

the defence that what he did was in the best interest of the plaintiffs and sub-purchasers or that he empathised with their situation. A

[157] On the facts as had been recounted and which could be discerned from the material before us, I need to say this. As is the case with the learned trial judge, my observation as to whether the plaintiffs have succeeded in the claims or otherwise, must not be obscured by ethical issues which in this appeal, appear to have no basis. It is in evidence that the first defendant, had candidly testified that upon stumbling on the opportunity as happened in this case to buy land, unhesitatingly went into the venture and made a profit. He did this even if his compassion in assisting the sub-purchasers had all along been in the equation. B C

[158] That is all well and good. But try as I might, I am unable to see from the facts, whether a solicitor-client relationship existed between the first defendant and the plaintiffs. There is no evidence of there being a contract between the first defendant and plaintiff and sub-purchasers. Thus simply put, where then lies the first defendant's fiduciary duty? D

[159] The learned trial judge had found that there was no evidence of such relationship. And even if there was, it had not been proven that the first defendant had contrived the situation is such a manner as to exert undue influence on the plaintiffs and sub-purchasers. E

[160] The bottom line now is simply this: F

(a) Was there a solicitor-client relationship to the extent that it amounted to it being a fiduciary relationships between the first defendant and plaintiffs and sub-purchasers?

(b) If the answer is in the positive, was that relationship breached? G

(c) Was there a conflict of interest when the first defendant purportedly acting for the plaintiffs and sub-purchasers had also acted for his own interest in bidding for the land?

(d) If there was such conflict and if the relation is fiduciary, should the first defendant be allowed to benefit from his breach? H

Or should he be ordered to disgorge the benefits?

[161] It is my view that it is not every time that a breach of the contract of retainer results in a breach of a fiduciary duty. I

[162] It is generally accepted that a fundamental duty of a lawyer is to act in the best interest of his or her client to the exclusion of all other adverse interest, except those duly disclosed by the lawyer and willingly accepted by the client.

[163] An authority which provides a judicial pronouncement on the question of a lawyer's fiduciary relationships with his client is to be found in the case of *3464920 Canada Inc v Strother* (2007) 281 DLR (4th) 640, a decision by the Supreme Court of Canada heard on 11 October 2006 and judgment rendered on 1 June 2007.

[164] Now for the brief facts of this case (*3464920 Canada Inc v Strother*) ('*Strother* case').

[165] The plaintiff corporation's business is to market tax sheltered investments in the film industry. For this purpose it retained the services of a lawyer who was a partner in a large law firm. The said lawyer is one Mr Strother, ie the defendant.

[166] Apparently the term of the retainer was that until the end of 1997, the retainer expressly prohibited the lawyer's firm form representing other clients in relation to the tax shelter schemes.

[167] After that, *under an oral retainer, the plaintiff continued as the lawyer's client, on a non-exclusive basis*. (Emphasis added.)

[168] The oral retainer did not provide for remuneration and advice was to be provided only when requested by the plaintiff and agreed upon by the lawyer.

[169] It is of interest that Strother assisted hugely in the success of the plaintiff, as the plaintiff was Strother's largest client.

[170] However in 1996 the government changed the relevant tax laws. Business was bad.

[171] Later, Strother then learned that there was a possibility that Revenue Canada might issue a favourable ruling for a new scheme that would allow a taxpayer to overcome the effect of the 1996 ruling.

[172] In 1998 Strother sought and obtained a favourable ruling on behalf of one of the plaintiff's competitors. Simultaneously Strother was still at that relevant time, retained by the plaintiff under the oral retainer.

[173] However Strother had, at the same time, agreed with the above said plaintiff's competitor to share the profits on the new venture. A

[174] Even as Strother was still representing the plaintiff at the material time, Strother had not informed the plaintiff about his dealings with the plaintiff's competitor, much less of his financial interest in those dealing. Strother did not inform the plaintiff about the new opportunities now open due to the favourable ruling. B

[175] In 1999, Strother resigned from the law firm and became a 50% shareholder in the competitor company. C

[176] The plaintiff brought an action for breach of contract and for breach of fiduciary duty against Strother and the law firm. The learned trial judge dismissed the plaintiff's action. D

[177] However on appeal, the British Columbia Court of Appeal ordered the lawyer to disgorge all profits derived from the relationship with the plaintiff's competitor company. E

[178] The law firm was held vicariously liable and required to disgorge all profits and return all fees it had earned from dealing with the competitor after the conflict arose.

[179] The law firm and Strother appealed, and the plaintiff cross-appealed to the Supreme Court of Canada. F

[180] Now before looking at the decision of the Supreme Court of Canada, one has to go back to first principles. G

[181] In the first place, one has to look at the scope of a lawyer's retainer, which is normally determined by contract. Whether the retainer gives rise to a fiduciary duty on the lawyer's part turns largely on the facts of each case. Thus my view is that the retainer defines the lawyer's fiduciary duty. H

[182] In the *Strother*'s case, what was the retainer given to the legal firm and Strother?

[183] To begin with, a short background of what the plaintiff did in its business venture was this. I

A **[184]** From 1993 to 1997, the plaintiff devised and marketed tax shelter investments whereby Canadian taxpayers, through ownership of units in a limited partnership, provided film production services to American Studios making films in Canada.

B **[185]** The tax shelter worked in this manner. Limited partnerships were established. The investors would notionally produce a film for a studio in return for a fee, paid over time that was contingent on the success of the film. The contingency of the payment introduced a substantial element of risk and the right to receive such speculative income at some future date was
C considered by Revenue Canada not to be a capital asset.

[186] In this way, expenditures for the film production were treated as deductible from other income in the year the expenditure were incurred.

D **[187]** In the early years, the scheme yielded a loss to the partnership. The loss was deducted by investors from their unrelated income — thereby sheltering this income from immediate taxation. If the film is successful, the tax collector's cut would at least be deferred.

E **[188]** The American Studios shared in the tax deferral benefit of the Canadian investors by an advantageous sale of their expenses of making the film to the Canadian investors.

F **[189]** The plaintiff derived a profit equal to the difference between what the investors actually paid and what the studio received, less its own expenses. This can briefly be described as the TAPSF shelter.

G **[190]** In this regard, the plaintiff was Strother's biggest client. The structuring of such shelters and negotiations of such rulings were key elements of Strother's expertise.

[191] In fact the trial judge found that Strother was instrumental in the
H plaintiff's success, where it closed transactions close to $460m, made profit of $13m and paid the legal firm $5m in legal fees.

[192] Now comes the important bit. Effective October 1996, the retainer (between plaintiff and the legal firm) expressly prohibited the legal firm from
I acting for clients other than the plaintiff in relation to the TAPSF tax shelter (with limited exceptions).

[193] However the above written retainer was terminated at the end of 1997. But the plaintiff continued thereafter as a client of the legal firm.

[194] It was in November 1996 that the government announced intention to amend the Income Tax Act with the introduction of a scheme called Matchable Expenditure Rules ('MER') to defeat the TAPSF tax shelters, but relief was granted from the new amendment until the end of October 1997, but no further than that.

[195] Thus by October 1997, the plaintiff's TAPSF business had been wound down. In late 1997, the plaintiff sought Strother's advice as to what could have done to salvage what was left of their business. Strother suggested deferral of that discussion until the new year.

[196] Then in November 1997 or thereabout, one tax lawyer called Joel Nitikman told Strother of a possible way of getting around the MER for the Stern Group of Companies (which was also clients of Strother); by what was described as a 'Lade' scheme. Nitikman and Strother discussed s 18.1(15)(b) which provided that MER would not apply where more than 80.1% of the right to receive income was realised before the end of the year in which the expenditure was made. This meant that the maximum 'loss' available for a tax deduction would be 19.9% of product expense only (as compared to 50% previously).

[197] Strother took up the idea of the Lade Scheme for Stern with Revenue Canada. It was only at the end of 1997 that Strother obtained information from Revenue Canada that a favourable tax ruling was not out of the question for a film production services transaction as long as it complied with s 18.1(15)(b).

[198] Then in early 1998 one Paul Darc, a former executive of the plaintiff discussed with Strother a scheme which combined both the fax shelter scheme with a new scheme of a tax credit business.

[199] Strother was interested enough in the new scheme and put up the proposal to Revenue Canada for a favourable ruling, on a pro bond basis; but with a caveat that should it be approved by Revenue Canada, Strother would be entitled to a personal benefit in a new company to be set up by Darc (which is called Sentinel Hill Entertainment Corporation ('Sentinel Hill')).

[200] It was revealed in evidence that both Darc and Strother had agreed in January 1998 that should the tax ruling he granted, Strother would receive 55% of the first $2m of profit and 50% thereafter.

[201] Strother did not tell the plaintiff about the possibility of a revival in the film production services business at any time.

[202] Subsequently a favourable tax ruling was issued to Sentinel Hill, based on s 18.1(15)(b) exception to the MER.

[203] Meanwhile throughout 1998 and 1999, the legal firm continued to do work for the plaintiff on outstanding matters relating to film production services transactions and general corporate work.

[204] According to the plaintiff in cross-examination, they relied on the legal firm's legal advice that when there is a change in the tax law, they (the legal firm) would have to find a way around it for them.

[205] Strother on the other hand, emphasised that the plaintiff was not consulting him for advice on the rules that had put an end to their tax shelter business or to explore whether there was any possibility of that business in some way being continued.

[206] The trial judge agreed with Strother and said that:

> … they had no reason to do so and had no expectation of receiving any advice in that regard.

[207] In August 1998, Strother wrote to the management committee of his legal firm about a possible conflict of interest with respect to acting simultaneously for the plaintiff and Sentinel Hill.

[208] The plaintiff, upon learning of the tax ruling on Sentinel felt betrayed. The plaintiff severed its relationship with the legal firm and proceeded to take legal action against the legal firm and Strother.

[209] Thus the question before us (in relation to the instant appeal) is whether Strother was in breach of his fiduciary duty toward the plaintiff, by being in a conflict of interest between the two clients (the plaintiff and Sentinel Hill), as much as whether the first defendant had breached his fiduciary duty by being in a conflict of interest between the plaintiff and sub-purchasers and his own personal interests.

[210] It was held in the *Strother*'s case, that generally a lawyer is not under a duty to alter a past opinion in the light of changing circumstances. That the lawyer was free to take on the competitor as a client under the terms of the 1998 oral retainer.

[211] The Court of Appeal in *Strother*'s case, in a taciturn observation determined that:

... the lawyer could have managed any possible conflict had it not been for the personal conflict that arose from the lawyer having a personal financial interest in the competitor's business. This put his significant personal interests into competition with the plaintiff.

Although the scope of a lawyer's retainer was determined by contract, it was overlaid with fiduciary responsibilities which included the duty of loyalty. His failure to revisit his 1997 advice when he had a undisclosed personal interest breached his duty of loyalty to the plaintiff.

[212] The above decision of the Court of Appeal in *Strother*'s case would be in tandem with the plaintiff's and sub-purchasers' position in the instant appeal.

[213] However the Supreme Court in *Strother*'s case reversed the finding of Canada's Court of Appeal above. The Supreme Court found that:

… A conflict of interest arises when a lawyer puts himself in a position of having irreconcilable duties or interests. The retainer defines the lawyer's fiduciary duty. The duty of loyalty extends only to the duties indentified in the retainer. Here the trial judge held that the oral retainer did not require the lawyer to provide the plaintiff with on-going tax shelter advice. This was a finding of fact that ought not be disturbed because their evidences no palpable and overriding error. The lawyer's fiduciary duty not broaden the contractual obligations so as to require him to provide ongoing advice a lot tax shelters. There was no breach of contract or breach of fiduciary duty. Moreover, it was not clear that disgorgement of profits was an appropriate remedy in a case in which the alleged wrong consisted of the trustee benefitting from an opportunity that arose in the office of trustee. The basis of vicarious liability under the Partnership Act was to be determined under the statue and the law of partnerships, by looking at the nature of underlying transactions, and not by applying the common law of vicarious liability of an employer for wrongs committed by a employee. The cross-appeal should be dismissed.

[214] Now turning our minds back to the instant appeal, the position of the parties vis-à-vis breach of fiduciary duty due to conflicts of interests, now seems clear.

[215] The 'retainer' if at all it could be termed as such merely consisted of the first defendant lodging caveats for some of the sub-purchasers and writing one or two letters to relevant parties for them. In that connection, it could hardly be described as confirming the first defendant's status as their lawyer, acting in all other respects with regards the land, for the plaintiffs and sub-purchasers.

[216] At its highest, it could be described as a limited retainer by a limited number of individuals for a specific purpose. It is limited to only lodging

caveat and nothing more, nothing less. This limited retainer which pertain only to specific matters is a far cry from it being a retainer to purchase land on behalf of the plaintiffs and sub-purchasers.

[217] Of greater significance is the basis upon which the first defendant bid for and purchased the land in question.

[218] The plaintiffs and sub-purchasers would have us believe that the first defendant made the bid on the land, on their behalf.

[219] My view is that after perusing the contemporaneous documents, letters written by the first defendant to the sub-purchasers, minutes of meetings held between the first defendant and the sub-purchasers, it was clear that prior to making both bids, the first defendant had put his cards on the table. He had explained his position clearly to the sub-purchasers, that he was moved by compassion rather than desire to make a 'quick killing', making easy profit at the expense of the sub-purchasers. In this way the first defendant said that the sub-purchasers would be spared the dreadful prospect of losing their money and for some, entire savings, in this land scheme. The first defendant had also made it clear that he would benefit by procuring the surplus land after allotments and deductions had been made to the sub-purchasers.

[220] Thus the first defendant made his intentions and the basis of his actions clear to the sub-purchasers prior to making the bids.

[221] Of critical significance too is the fact that there was no evidence of a solicitor-client relationship between the first defendant and the plaintiffs and sub-purchasers of the nature contended. In particular, there was no evidence of warrants to act having been executed nor of payments of fees and disbursements having been made.

[222] In fact the learned trial judge made a finding that the sub-purchasers were under a misconception that the first defendant had acted as their solicitor in connection with the bid.

[223] As was the position in the Canadian case of *Strother* above, in the instant appeal as there was no solicitor-client relationship, there was no basis for a fiduciary relationship and accordingly no fiduciary duties were owed. In fact, as was also found in the *Strother*'s case, where the limited retainer may be said to have been in existence, fiduciary duties cannot be prayed in aid to enlarge the scope of contractual duties.

[224] Thus on the strength of authorities such as that of *3464920 Canada Inc v Strother* and *Clark Boyce v Mouat* [1994] 1 AC 428, it is clear that where a limited retainer may be said to be in existence, fiduciary duties cannot be prayed in aid to enlarge the scope of contractual duties.

[225] This strengthened my view that whether the conflict of duty exists would depend on the scope of the retainer between the lawyer and the client in question. The fiduciary duties owed by the lawyer are moulded by the retainer, as lawyers act in a global sphere, representing a multitude of clients.

[226] An important component to the above is this.

[227] The issue before us is whether on the facts of this appeal, a conflict arose. This question is central to the issue at hand. A conflict arises when a lawyer puts himself in a position of having irreconcilable duties or interests.

[228] Thus it gets down to what duty the lawyer owed to the client alleging the conflict. And concomitantly whether the lawyer held a personal interest that conflicted with the first duty.

[229] In that context how would one determine fiduciary duty?

[230] In *Hodgkinson v Simms* [1994] 3 SCR 377 at p 407; (1994) 117 DLR (4th) 161, La Forest J observed that:

> … many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations. See *Johnson v Birkett* (1910) 21 OLR 319 (HC); *McLeod v Sweeney* [1944] SCR 111; PD Finn, *Contract and the Fiduciary Principle* (1989) 12 UNSWLJ at p 76.

[231] In connection with the above, my view is that the language and terms of a retainer between lawyer and client is the lynchpin. It is essentially an agency agreement, which in most cases, is overlaid with a duty of loyalty, where the lawyer commits to doing certain things for the client, which in turn attracts the fiduciary duty of loyalty.

[232] Thus 'where the retainer is written, one looks to the words of the retainer. Where it is oral, one asks what the oral terms were' (per Mc Lachlin CJC in *3464920 Canada Inc v Strother*).

[233] Where duties are attached to a work for which the lawyer is retained, but not specified with precision, it may be a question of implied duties. In

A that sense therefore, the nature and scope of a lawyer's retainer is in the main, a factual question on which the findings of the trial judge should not be overturned on appeal, save for error arising from misapprehension of the evidence before him.

B **[234]** More so in this type of cases which this appeal represents; the alleged breach is an ethical one; the enquiry is basically fact driven which is largely within the trial judge's purview.

C **[235]** Thus in a nutshell, the lawyer owes the client a duty to act loyally for him/them as agreed in the retainer. These duties are not abstract, but are real and palpable, as are determined by the retainer.

D **[236]** Rigorous fiduciary duties imposed on lawyers grounded in the contract of retainer, are however, tempered with considerations, consonant with the realities of current practice.

[237] As described by Binnie J in *R v Neil* (2002) 218 DLR (4th) 671:

E > … a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interest of another current client …

F **[238]** Thus whether an interest is 'directly' adverse to the 'immediate' interest of another client is circumscribed in the duties imposed on the lawyer by the relevant contracts of retainer.

G **[239]** This precision not only protect the clients, it also allows the lawyers and law firm to act and serve multiple clients in the same field. I believe this would serve public interest.

[240] Thus we go back again to the terms of the retainer, for the fiduciary duty between lawyer and client is to be found in the contract between them.

H

[241] In the context of the instant appeal, the question is whether the first defendant's duty to the plaintiffs and sub-purchasers conflicted with his personal interests?

I **[242]** In my view the learned trial judge took the correct approach in that he asked what the 'retainer' obliged the first defendant to do for the plaintiffs and sub-purchasers. Obviously the first defendant cannot acquire personal interests that might conflict with his 'duties' (if at all they exist in this appeal) to the plaintiffs and sub-purchasers. However the first defendant was

perfectly entitled to take on duties of other clients or acquire personal interests that were not directly adverse to his 'duties', to the plaintiffs and sub-purchasers as 'defined' in the retainer. A

[243] As had been alluded to earlier, the first defendant's lodging of caveats for some of the sub-purchasers and letters written for them, at best amounted to it being a limited retainer, by a limited number of individuals for a specific purpose. B

[244] How then in the instant appeal, could it be translated into an instruction by the plaintiffs and sub-purchasers to the first defendant to purchase land on their behalf? C

[245] The learned trial judge found the first defendant's version to be true and correct; that the first defendant had made it very clear to the plaintiffs and sub-purchasers the capacity in which he was to make the bid. D

[246] In any event the first defendant's version was supported by contemporaneous documents and minutes of meetings held between the first defendant and sub-purchasers. The first defendant had also been forthright about his own position (ie his personal capacity in the bid, and the purpose for the bid and his personal and financial interest). The plaintiff and sub-purchasers were not in the dark about the first defendant's act and intention in the bid. E

[247] The learned trial judge also found that the evidence of other witnesses (such as SD12, SD8 and SP13 among others) supported and corroborated the first defendant's testimony. The learned trial judge also found that there was nothing to show that there exists a solicitor-client relationship between the first defendant and plaintiffs and sub-purchasers; I see no reason whatsoever to intervene with the learned trial judge's findings above. F G

[248] Lord Browne-Wilkinson in *Horace Brenton Kelly v Margot Cooper and another* [1993] AC 205 had observed that: H

> … The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with and conforms to them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction. I

[249] Thus it is my view that an arbitrary or unnecessary expansion or contraction of the duty may be inimical to the proper functioning of the legal system.

[250] Thus in my view, the learned trial judge could hardly be accused of misapprehending the facts and the law, given the clearly limited retainer as manifested in the instant appeal. The learned trial judge's findings of fact thus stand unimpeached.

FRAUD

[251] On the facts, there was no evidence of fraud on the part of the first defendant, second defendant and third defendant. Legally such allegation need be proven by the plaintiff beyond a reasonable doubt (see *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81).

[252] Authority such as *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196 had decided that the imputation of fraud must be actual, involving dishonesty of some sort where someone is cheated of an existing right or where by a deliberate and dishonest act, a person is deprived of his existing right.

[253] Are there such elements proven by the plaintiffs in this appeal?

[254] With regard to the question of whether the fifth defendant had actual knowledge of the presence of the sub-purchasers on the land, the learned trial judge chose to believe SD17's version for obvious reasons.

[255] The allegation of SD17's knowledge (of existence of squatters) came from SP8. But interestingly when SD17 denied this, he was not challenged nor cross-examined on this fact. The fact that the loan was approved long after SD17 had left the fifth defendant and the fact that SD17 by then had worked elsewhere ie at Taylor's College, offered no reason at all for SD17 to tell lies in the fifth defendant's favour.

[256] As had been stated earlier, I find, as did the learned trial judge that SP8 is an unrealiable witness. Confronted with these two conflicting versions, my view is that the learned trial judge was perfectly entitled to accept SD17's evidence.

[257] In view of the above, the learned trial judge was correct in finding that the allegation that the fifth defendant had actual knowledge of the presence of the sub-purchasers on the land was sheer surmise, not premised on any factual basis. And so, even if it had been proven that the sub-purchasers had an interest in the land, it is clear that the fifth defendant did not have any notice of their alleged presence and beneficial interests.

[258] The plaintiffs raised the issue of the charge to fifth defendant being invalid since its registration was done without the Menteri Besar's consent. That issue was never pleaded and anyway the simple answer to that is this. Putting the above contention aside, this contention is misconceived since the evidence clearly showed the endorsement 'KMB' on the document. 'KMB' is accepted to mean 'Kebenaran Menteri Besar'.

[259] The plaintiff further argued that the transfer of the land was invalid since it was done without the consent of the Menteri Besar.

[260] In agreeing with the fifth defendant that in this instance such consent was not required and SD13's evidence that such consent is a requisite only in a voluntary sale situation not in a transaction of the land where it is a forced sale by the R & M or upon an order of the court or in a situation involving a vesting order, the learned trial judge's finding is therefore correct. I see no reason to intervene with the said finding.

[261] This is strengthened further by the stand taken by the fourth defendant, supported by the other defendants that the plaintiffs had failed to prove their assertion that they had beneficial interest in the land. As such the plaintiffs lacked capacity to bring this suit against the defendants.

[262] In agreeing with the above reasons, I find that the learned trial judge had made a proper finding.

[263] For reasons already given above, what the plaintiffs had asserted regarding the lack on the fourth defendant's part when it said that it was a bone fide purchaser without notice on the ground that the fourth defendant was the first defendant's alter ego, was completely without merit.

[264] In any event, since the land was purchased in a proper bid by first defendant in a valid pubic auction called by the R & M (of third defendant), the fourth defendant bought the land from the first defendant.

[265] The first defendant informed the co-executive director of fourth defendant ie SD14 that 43 purchasers had acquired 360 acres of the land leaving a balance of 3321 acres.

[266] SD14 then caused two other companies ie Lien Hoe Xing Sdn Bhd and Jugra Palm Oil Sdn Bhd to buy the said portion of the land. The two companies paid RM4,649,400 for the purchase of those portions in the land. It was not put to both SD14 and SD15 (the owner of Lien Hoe Xing) during

their cross-examination that the fourth defendant had knowledge of any beneficial interests of the plaintiffs. In fact SD12 even testified that:

> When we inspected the property there was no access road and we all reach the site by car. The property was more or less abandoned. No one took care of it. The back portion was all jungle.

[267] In my view as was the learned trial judge's, the evidence of both SD14 and SD15 manifested that they were bona fide purchasers without notice of the land. How could it then be said that there was anything untoward or even diabolical about the sale of the land by first defendant to the fourth defendant?

REPRESENTATIVE ACTION

[268] As regards whether this suit is a representative action or otherwise, one needs to look no further than to O 15 r 12 of the Rules of the High Court 1980. It states:

> (1) Where numerous persons have the same interest in any proceedings, not being such proceeding as are mentioned in rule 13, the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

[269] It is trite that the three criteria to satisfy the rule are common interest, common grievance and that the relief sought must be beneficial to all (*Tong Tai Holdings Sdn Bhd v Jimi ak Mantali & Ors* [2003] 5 MLJ 450).

[270] Though the defendant took the approach that the 213 sub-purchasers represented by the four plaintiffs were at no time identified in the evidence either by name or the plot numbers they hold in the land, and that there were varying agreements (for sale of shares or for sale of land) thus there was no common interest, and the learned trial judge found this contention to be unsustainable.

[271] The first defendant's further contention that the fact that 43 of the sub-purchasers had entered into agreements with the first defendant made it uncertain as to whether these 43 sub-purchasers came with the 213 plaintiffs.

[272] However the plaintiffs simple answer to all these issues is this. The identity of the 217 plaintiffs was made in a letter ('P34') on whose behalf SP7 filed an earlier action and that in a representative action, the plaintiffs need

not identify each and every person he is representing. As was observed by Haidar J (as he then was) in *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427:

> A plaintiff suing in a representative capacity does not have to obtain the consent of those whom he purports to represent and the fact that there are two opposing factions within the Kayan community does not prevent this action from being a representative action.

[273] The learned trial judge took the position that the exact identity of the persons whom the four named plaintiffs are representing are not critical nor imperative. The absence of these is not an impediment to commencing a representative action so long as they are a class of persons with a common interest and a common grievance.

[274] The learned trial judge found that the said representative action of the plaintiffs was properly constituted even if in the event of success, they would be entitled to different measures of relief. In fact the 213 unnamed plaintiffs represented by the four named plaintiffs need not even give their consent, and are not liable to costs (see Sultan Azlan Shah (the FJ) in *Eh Riyid v Eh Tek* [1976] 1 MLJ 262).

[275] I agree with the above finding of the learned trial judge and again, found no reason to intervene.

[276] As if the above 'flaws' in the plaintiffs' case were not enough, it is puzzling as to why three of the four named plaintiffs who claimed to represent 213 other sub-purchasers, *failed* to appear in court and testify to lend support to their claim.

[277] The fate of the sub-purchasers is tragic enough without them having to bear the brunt of the plaintiffs' failure to discharge the burden cast upon them under s 101 of the Evidence Act 1950.

[278] In the circumstances the decision of the learned trial judge in arriving at the findings of fact and law as indicated above were correct, proper and in order, and I do not see any misdirection or misapprehension on his part, thus obviating the need to exercise judicial intervention in this appeal.

[279] I therefore dismiss the appeal with costs here and below. The order of the High Court is affirmed. The deposit is to be paid to defendants on account of taxed cost.

Abdul Malik Ishak JCA (delivering majority judgment):

INTRODUCTION

[280] After a full trial, the High Court dismissed the plaintiffs' claims. Aggrieved by that decision, the plaintiffs filed an appeal to this court.

[281] This judgment emphasises the danger of an advocate and solicitor in accepting a retainer which will place him in a position of conflict between interest and duty (*Spector v Ageda* [1973] Ch 30). While it is true that an advocate and solicitor is free to choose his client, the converse is also true. The client has a right to counsel of his own choice (*Oswald Hickson Collier & Co (a firm) v Carter-Ruck* [1984] 2 All ER 15 (CA) and *Foster v Elsley* (1881) 19 Ch D 518). Once a relationship between an advocate and solicitor and his client is created, fiduciary obligations will arise (*In re Van Laun, Ex parte Chatterton* [1907] 2 KB 23 at p 29 (CA) and *Oswald Hickson Collier & Co (a firm) v Carter-Ruck*).

[282] No formalities are required to constitute a valid retainer. The retainer may be in writing, and may be oral, or inferred from conduct (*Pinley, Gent, one, & c v Bagnall* (1723) 99 ER 3 Doug KB 155 and *Blyth v Fladgate Morgan v Blyth Smith v Blyth* [1891] 1 Ch 337). In *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196 (FC) for instance, a retainer was in place despite the absence of the bill of costs. In that case, Dr Das persuaded the respondent to put up her property as security as part of the inducement to the appellant to be a guarantor of Dr Das' overdraft facilities. After a meeting in the respondent's house, where she was asked to sign various documents relating to her property, the appellant's firm wrote to the bank to which the respondent's property was charged stating that they were acting for the respondent. The Federal Court held that in these circumstances, although the firm had not sent any bill of costs to the respondent, they were acting for the respondent and, consequently, a solicitor and client relationship subsisted between them.

[283] Of significance would be this. If a solicitor considers that the services he is performing for a client are only limited, this should be put in writing to avoid misunderstanding (*Begusic v Clark, Wilson & Co et al* (1992) 92 DLR (4th) 273, British Columbia Supreme Court).

THE FACTS

[284] Everything centres on the land in Perak. That land was initially alienated by the state to Nam Bee Estate Sdn Bhd ('Nam Bee'). The land was

then sold by Nam Bee to Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPKB'). Although SPPKB had paid the full purchase price to Nam Bee, the land was not transferred to SPPKB.

[285] According to Abdul Naim bin Ahmad Ramli ('SP6'), after the land was surveyed by the survey department, a final title was issued showing the size of the land to be 1490 hectares. That final title was issued on 30 June 1989. SP6 testified that the registered owner of the land was Simpang Empat Plantations Sdn Bhd — the third defendant ('SEP').

[286] Rengganaten a/l Arumugam ('SP8'), a director of SEP, neatly explained the sequence of events that led to SEP being registered as the registered proprietor of the land. In his examination-in-chief, SP8 testified as follows (see the appeal record B1 at pp 241–243):

> I am a director of SEP. I was once a director of SPPKB. SPPKB was established on 26.11.1979. We ie 9 directors planned to form a company so we registered the said company. We wanted to start a business involving property.
>
> In the beginning, we planned to start a housing business but it was not successful. Later, we shifted to agriculture and after that we got a piece of land for agriculture. The land belonged to Nam Bee Rubber Estate Sdn Bhd (NB). Our company bought the said land. SPPKB entered into an agreement with NB.
>
> I have here a document titled 'Payment Stopped' presented and marked as Exhibit P38. The land price was RM3.2 million. Other than P38, NB had given us a few other documents. A letter from PHT, Land Office with plans P.A. 53337 presented and marked as exhibit P39A & 39B. An agreement was entered between our company and Tan Ann Loong. I signed this document as Managing Director of SPPKB.
>
> Declaration of Trust is presented and marked as exhibit P40. P40 is regarding land Lot No. 6860 Mukim Hulu Melintang. Paragraph D was read to witness and affirmed by witness.
>
> Yes, I did say that SPPKB bought the land from Nam Bee P40. SPPKB could not transfer the land to our company's name, therefore an agreement was made to transfer the land to SEP. When I asked the Land Office people, they told me that the land cannot be transferred. It is because our company and NB had separate directors. The transfer can be made if NB forms a subsidiary company. SEP was formed as a subsidiary of NB. The said land was transferred from NB to SEP. The directors of NB and SEP were (the) same. We always contact and discuss regarding the said land. During registration, the directors of NB & SEP were maintained. After registration, SPPKB's directors replaced the directors of SEP. After P40 was made, an agreement was entered between NB and SPPKB. I signed one agreement as director of SPPKB. Dated 22.8.1985. Agreement marked as Exhibit P41.

[287] SP8 went at length in explaining the devolution of the title to the land and the necessity for the directors of SPPKB to establish a new company

by the name of SEP. The purpose of establishing SEP was quite apparent. It was to enable the land to be transferred to SEP. The same directors of Nam Bee also became the directors of SEP. Only later that the initial directors of SEP were replaced by the directors from SPPKB.

[288] By written agreements of diverse dates between 1980 to 1989, SPPKB sold plots on the land to the plaintiffs and other sub-purchasers. What SPPKB did was perfectly legitimate because SPPKB bought the land from Nam Bee on 5 December 1979 as reflected in exh P38 which can be found at p 1765 of the appeal record C1. Exhibit P38 is a payment receipt evidencing the sale of the land from Nam Bee to SPPKB and it was stamped and it was worded in this way:

> PAYMENT RECEIPT
>
> We, NAM BEE RUBBER ESTATE SDN. BHD. of No. 2305, Batu 2½, Jalan Maharaja Lela, Teluk Anson (hereinafter referred to as the Vendor) have this 5th day of December, 1979, received from Syarikat Pembinaan Perusahaan Kemajuan Berhad (hereinafter referred to as the Purchaser) of No. 2A, Jalan Peri, Simpang Ampat, Hutan Melintang, the sum of Dollars Fifty One Thousand only ($51,000/=) in the manner herein specified being the part payment to account of the price of the lands held under Lot Nos. 6860 in the Mukim of Hutan Melintang, comprising of an area of 3541.165 acres (jungle).
>
> MODE OF PAYMENT

(a) Cash on 5.12.1979	$ 1,000.00
(b) Cheque No. 044751 drawn on Bank Bumiputra Berhad, K.L. dated 6.12.1979	$25,000.00
(c) Cheque No. 205334 drawn on Hongkong & Shanghai Banking Corporation, Teluk Anson dated 20.12.1979	$25,000.00
Total	$51,000.00

> The mode of payment of the balance of the price of the said land shall be paid on later dates as arranged when a proper agreement of sale shall be executed.
>
> NAM BEE RUBBER ESTATE SDN. BHD.
>
> Sgd: (Illegible)
>
> Director (LEOW KHEONG HUU).

SP8 explained the sale of the land from Nam Bee to SPPKB in this way (see p 270 of the appeal record B1):

> SPPKB bought the land from Nam Bee Rubber Estate on 5.12.1979. No agreement was entered with the sub-purchasers before the date. No agreement was made between SPPKB and Nam Bee. The said purchase was affirmed by the receipt

only (P38). The agreement was only made in 1981 i.e. Declaration of Trust (P40). Yes, the supplementary agreement was made – P41, but no main agreement made.

[289] As stated, the sub-purchasers purchased their lots from SPPKB via agreements. Samples of these agreements can be seen in exhs P4 and P5 as seen at pp 1496–1505 of the appeal record C1. In exh P4 the agreement was dated 10 September 1984 while the agreement in exh P5 was dated 6 December 1979. In exh P4, the agreement was between SPPKB and Pajadathaly d/o Simanjalam while exh P5 was an agreement between SPPKB and Subbamamah a/p Senaya @ Sinniah.

[290] It was emphasised that the sub-purchasers who bought their lots from SPPKB were mostly poor illiterate people who were attracted to the scheme proposed by SP8 and they believed that it was a good investment for their future. It seems that these sub-purchasers had used up their savings to purchase those lots on the land. Perhaps it would be ideal to refer to the evidence of Putharaju a/l Applasamy ('SP9'), one of the many purchasers, in order to have an insight as to what had happened (see the appeal record B1 at pp 325–326):

Witness was referred to an Agreement.

Yes, this is my signature in the agreement. This is my agreement with SPPKB where I bought land from SPPKB.

The agreement dated 9.2.1981 in page 1 AB1, marked – exbt P53.

I knew about the land through a friend in 1979. I met Mr Rengganathan, MD SPPKB. I decided to buy 5 shares. I was interested in the mode of payment for the sale of the land where the balance payment from the total can be paid by instalment. Secondly, 40% of the sale of produce is for the purchaser and 60% is for payment of debt. This is stated in Clause 2 Exbt P53.

In the beginning, I took out from my family saving a sum of RM1000/- and paid SP8 as deposit. After that until 1981, I paid by instalments a sum of RM7250. Only after paying the said sum, P53 was signed by me. According to P53, after signing it, I must pay for another 48 months, each month RM300. I had already settled the payment for 48 months. After paying for 48 months, there was another payment for RM3600 which I paid by instalment. I had paid a total of RM26,250/-.

Refer to page 10 — P42.

Yes, the serial number 298 is my name and in there it is stated the payment that I had made. According to P53, I should get the land after the half payment was made. I did not get after the half payment was made.

I have met SP8 several times to get the land, from 1986 to 1990. In 1990, SP8 showed me a piece of land and told me to cultivate on the land. The land shown to me by SP8 was a piece of land with plants and drains. The land was not marked,

there were only drains around it. My brother in law and I worked on the land. We worked on the land for 4 to 5 months. After that, A. Rengganathan met me and told me that he would like to take back the land as he would like to work on the land with the Agency's help. 40% of the produce from the land will be given to me and 60% will be used to pay my debt. I agreed to this arrangement because I trusted SP8. After taking back my land, SP8 never gave the 40% of the produce of the land as promised.

[291] Yet another sub-purchaser would be Ramachandran a/l Govindasamy ('SP11') and this was what he testified in his examination-in-chief (see pp 366–369 of appeal record B1):

Yes, SP10 is my wife.

Witness was referred to P56.

Yes, P56 was signed by my wife. I can identify the agreement. This is the agreement for buying land. 3 lots measuring 9 acres were bought by my wife.

Yes, 2 of the 3 lots were bought earlier under my mother-in-law's name. 2 of the lots were bought in 1981. I knew about the sale when I read an advertisement in the Tamil newspaper 'Tamil Osai'. There was one whole page advertisement. The newspaper advertisement marked 'P58'. Translation marked 'P58'.

There were particulars of the land in the advertisement P58. It is stated that the land were planted with oil palm. In the advertisement it was stated that oil palm will be planted and then given. In the advertisement it was stated that the land was for sale. The conditions of sale stated in the said advertisement. After reading the advertisement, I discussed with my family. We decided to buy six acres of land under my mother-in-law's name. It was my long time wish to buy property for my family. I can accept the conditions stated in the agreement. Because, for 6 acres the deposit was only RM1000/-. After the said payment, the next payment was RM2000/- only. After one month, we will sign the agreement and on that day RM4000/- must be paid. The next payment was for RM140/- per month for 60 months. The balance of RM9000/- will be paid from 60% of the sale of produce.

All these conditions were stated in P58. After having made the decision to buy, I brought my mother-in-law to an office of one by the name of A. Rengganaten. I met him and paid the deposit for RM1000/-. Mr. Rengganaten brought me to a lawyer's office to sign the agreement. Before signing, the agreement was read and explained to me by the lawyer. The lawyer explained to me the whole contents of the agreement. The 2 important matters explained were that I bought 2 lots of land measuring 6 acres and after 60 months, the payment for the land will be made from the sale of produce harvested. After that, my mother-in-law signed the agreement. This happened in 1981.

In 1984, my mother-in-law passed away. After that, I went to see Mr Rengganaten to transfer my mother-in-law's name to my wife's name at the same price. P56 was referred. Clause one states that the payment of RM15,400/- was made. The deposit by mother-in-law was added to the payment under agreement P56. For my mother-in-law's agreement and for my wife's agreement, I arranged all matters pertaining to it. Refer clause 2(a).

Yes, payment under Clause 2(a) was already made. For Clause 2(b), I should pay a sum of RM900/- but I only paid RM300/-. Encik Rengganaten informed me that the land was still a jungle and asked me not to make the whole payment. The land was given to me after paying RM300/-. Mr. Rengganaten gave me a document after paying RM300/-. Rengganaten gave me 3 lots of land. The said lots was marked by me. This happened in 1989.

When the land was given to me, there were oil palm plantation but the land was a jungle. There was no proper access road to my land. It was difficult to enter the land to take the produce. I took care of the land for around 5 – 6 months. After that, Rengganaten came and informed me that he would personally clear the land and after harvesting, he will take 60% of the sale of produce harvested and give me 40%. I agreed. I gave back the land to Mr. Rengganaten. After that, I was not given 40% of the sale of produce harvested as promised.

[292] The purpose of the sale of the land was explained by SP8 and he too confirmed that the land was sold to the people. This was what he testified before the High Court (see pp 243–244 of the appeal record B1):

We wanted to work on the land to gain profit for the company and for (the) people. In the begining we divided the said land to 1000 lot(s) and 1 lot measures 3 acres. Later, we fixed a price for each lot and sold the land to the people. The sale of the land was done through agreements. Witness was referred (to two agreements) P4 & P5.

Yes, I signed both P4 & P5 as Managing Director. It was also signed by another SPPK director, i.e. Mr Kandan. All the land was sold vide agreements such as P4 & P5.

Recently I gave all the agreements to Mr Ramachandran after receiving a subpoena.

More than 700 people bought the land. There were a few cancellations and withdrawals of purchase.

Now, there are more than 500 but less than 600 sub-purchasers.

Refer to Exhibit P4.

The purchase price of the land for all agreements is not the same. It varies from individual. In the beginning the purchase price was RM10,500/- per lot, after that RM12,500/- per lot, later RM13,000/- per lot and finally RM15,000/- per lot.

[293] Everything seems to go on well. All the sub-purchasers were unaware about the schemings and dealings pertaining to the land in question. The corporate twists and turns bedazzled everyone including all the sub-purchasers. They did not know and they were in the dark that the land was now registered in the name of SEP. In dire need for finance, SP8 had, meantime, charged the land to MBf Finance Bhd — the fifth defendant ('MBf'). The charge was executed between SEP and MBf and a debenture was then created over the land in favour of MBf.

[294] SEP defaulted in its repayment to MBf. Receivers and managers ('R & M') were appointed by MBf to take over the affairs of SEP. Subsequently, the land was advertised in the newspapers on 11 August 1992 for sale by tender. This can be seen at p 148 of the appeal record C5 and it was worded in this way:

SALE BY TENDER

Tenders are invited for the purchase of the following property belonging to a plantation company on an 'as is where is' basis.

1. PLANTATION LAND AND BUILDING

Title: Pajakan Negeri 35553 Lot No. P.T. 125

Locality: Mukim of Hutan Melintang

Tenure: Leasehold term of 60 years expiring on 10th October 2042.

Area of Lot: 1,490 Hectares (810 Hectares planted with Oil Palm, 680 Hectares comprise of vacant and jungle land)

Category of Use: Agriculture

2. OFFICE EQUIPMENT/FURNITURE AND FITTINGS

All tenders on the approved forms are to be sealed and submitted to the Receivers and Managers to reach them by 5.30 pm on 8th September 1992. Late tenders will not be entertained.

For tender forms and further details, please contact:

The Receivers and Managers

c/o Ernst & Young

35, Jalan Hussein

30250 Ipoh, Perak

Tel No. 05–511255 Fax No. 05–538427

(Mr Suppiah Periasamy/Mr Chandra Segaran)

ERNST & YOUNG.

[295] The sequence of events that led to the sale by tender ('first auction') are set out in the evidence of SP8. This was what SP8 testified (see pp 251–255 of the appeal record B1):

There were a few problems faced by my company.

First, I was facing financial problems. To overcome it, I planned to take a loan from anyone. I took a loan from a bank. There were two loans. The First loan was from Maybank in 1985 for RM500,000/-. The loan sum was given directly to SEP. I took drawdown a few times for 2 months. The loan could not solve my problem.

The said sum was not sufficient for our project. There was also an overdraft facility for RM500,000/- from Maybank. I took out the overdraft money within four months. My problem still could not be solved.

I took the Second loan from MBF Finance for RM2.5 million as in page 329 in AB-1. I applied for a bigger sum i.e. RM5 million but only RM2.5 million was approved. The purpose of (the) loan was mentioned (at) pages 329-330 AB-1. The redemption sum to Maybank had become RM1.8 million since the loan in 1985. Since the loan in 1985, no payment was made, only interest was paid. In 5 years, I had paid RM100,000/- as interest.

I was not paid any part of the sum of RM700,000/- mentioned (at) page 330 AB-1. MBF paid the money to Planting Agency.

Para (g) page 331 — Appointment of Plantation Agencies Sdn. Bhd. Plantation Agency was appointed by MBF with a condition that all management of SEP are carried out by the Agency. Only if we agree with the said condition, the loan would be given to us. RM700,000/- was handed to the Planting Agency and not to me. The Agency has full power over the company. As regards to the said loan, the Agency will pay directly to MBF.

No money from the loan either receipt or repayment was entered into our account.

After the loan was approved in December, the Plantation Agency took over SEP. After that, I was no longer involved in the management of SEP. The Agency managed SEP for one year.

After one year, the receivers took over SEP. The receivers took over because SEP failed to pay the loan. The interest for one month was not paid MBF informed me through a reminder notice. In the reminder notice, the sum not paid was mentioned. I contacted the Plantation Agency regarding this notice and was promised that they will pay MBF. They said they will try to pay.

(Mr Leong objected to these questions because it was not in the pleading).

Court:

(Objection disallowed. This evidence is part of (the) narrative of (the) plaintiffs case. It does not have to be pleaded.)

After that when the interest was not paid to MBF, we received another letter from MBF requesting payment within 7 days. This notice was received by us after the expiry of 7 days.

After that, I contacted MBF by telephone and I was informed that the officer in charge was on leave. Then, the receivers gave me a letter informing me that they were appointed to manage SEP.

Yes, the Receivers & Managers (R & M) were appointed by MBF under the loan agreement. After R & M were appointed, I was no longer involved in the management of SEP. R & M were appointed in May, 1992. After that, I contacted the receivers as regards to the R & M taking over the management and R & M called me to their office and explained to me that they were appointed by MBF to manage SEP.

A The land was advertised in the newspaper for sale by tender. This was in Sept, 1992. Before the advertisement, I did not know about the sale. After seeing the advertisement, I contacted R & M and MBF and I was informed that they could not do anything as the advertisement came out in (the newspaper). Later, I went to see a lawyer, M/s Logan Sabapathy to stop the sale and get back the land.

B

[296] Dato' Robert Lim ('SP12'), in his evidence, gave a good insight as to the thinking behind the first auction. This was what SP12 said (see p 960 of the appeal record B3):

C We then had to decide as to whether to continue operations or stop and put the estate up for sale. In respect of SEP we determined that there were insufficient funds for the company to operate and in order to continue we need to do a lot of replanting and require a lot of fertilisers. So we decided to put the estate up for sale.

D

[297] When news leaked out that the land had to be auctioned off, the initial reaction was to secure the services of a lawyer. SP9's evidence on this point can be seen at p 327 of the appeal record B1:

E After taking back my land, SP8 never gave the 40% of the produce of the land as promised. After 1 – 1½ years, I heard that the said land will be auctioned. After that, we gathered in Simpang Empat and formed a committee. We appointed one Mr Muniandy as the Chairman and we gave him power to salvage our land from auction. We decided to appoint a lawyer to help us.

F

[298] SP11 testified about the gathering of some 110 persons to meet the first defendant — the lawyer in question, for the very first time. This was what SP11 said (see pp 370–371 of the appeal record B1):

G In 1992 I got to know from my neighbours that the land I had bought is going to be auctioned.

I went to see a person named Muniandy to ask him to be our leader to take action in respect of the land.

H Mr. Muniandy told me he had taken action and gone to see a lawyer. He also told me and others to gather at Rengganaten's office on 30/8/92 as the lawyer will be coming there. I went there on that date.

About 110 persons gathered there. The object of the meeting was because Mr. Bachan will be attending. Mr. Bachan did attend on that day. Before entering I Rengganaten's office he spoke to us. Mr. Bachan said he had come as our lawyer and we do not have to worry. Mr. Bachan is in Court (D1 identified). After that Mr. Bachan went in to meet Mr. Rengganaten. We waited outside. After that Mr. Bachan came out and spoke to us. Mr. Bachan showed us a cheque for the amount of RM3.5 million. Cheque D15 shown.

Yes, this is the said cheque. Mr. Bachan informed us that Rengganaten will pay the loan and D15 was the proof that the payment shall be made. He also informed that the auction will not take place and told us not to worry. Mr. Bachan also showed us a letter. Exbt D14.

The letter states that as our lawyer, that the agreement with SPPKB will be transferred to a new agreement under SEP's name. He did not say anything about the transfer of the land. At that time, we did not work on the land. The land was planted. Mr. Bachan said that we can work on the land and that we will not be stopped. A photostat copy of the said letter was given to each and every one of us. After that, I followed Mr. Bachan to make a police report. I do not know who made the report.

After we went back, Mr. Bachan did not call us about the 1992 auction. After 30.8.1992, I do not know at all about the auction. After the date, I went to work on the said land.

[299] At that first meeting with the 110 persons, the first defendant showed a letter marked as D14. Exhibit D14 was a letter signed by SP8 dated 30 August 1992 from SEP to Messrs Bachan & Kartar, Advocates & Solicitors, and it was drafted by the first defendant and it can be seen at p 43 of the appeal record C5 and also at p 2526 of the appeal record C3 and it was worded in this way:

Dear Sirs,

Sale & Purchase Agreements in respect of Land known as No. Pendaftaran 35553 Lot No. 9108 formerly known as Lot 6860 between Sub-purchasers and Syarikat Pembinaan Perusahaan Kemajuan Berhad (S.P.P.K.B.)

We refer to the above matter and wish to inform you as solicitors for the Sub-purchasers that we have taken steps to repay in full the outstanding sum owing to MBF Finance Bhd. As such we can assure that the pending sale by tender schedule to take place on 8th September 1992 would not take place.

Further we would upon full payment of the balance purchase price ensure that the portions purchased by the sub-purchasers in the above stated land would be transferred into the names of the sub-purchasers.

The proposed agreements in substitution would take into account and give credit to all the monies paid by the sub-purchasers to S.P.P.K.B.

Thanking you.

Yours faithfully,

Sgd.: Illegible

S.A. Rengganaten.

[300] The protemp chairman in the person of Muniandy a/l Sinniah ('SP14') gave his version of the events that led to the first auction. This was what he said (see pp 462–463 of the appeal record B1):

> Rujuk ms 148 AB 1 — Iklan Tender.
>
> Yes, I have seen this advert. I and some sub-purchasers went to MBF in KL and met one officer, a Chinese lady. I explained to her the position of the sub-purchasers in the property. She expressed her sympathy but told me she could not do anything as MBF had already appointed R & M. She advised me to see Dato' Robert Lim of E & Y.
>
> I visited Dato' Robert at his office in Ipoh. I pleaded with him to sell back the property to the sub-purchasers. He is a real gentleman and a kind hearted person. He assured me to do his best and asked the sub-purchasers to bid for the property. One Mr. Suppiah was called in to join us.

[301] Another important witness who testified for the plaintiffs was Suppiah a/l Periasamy ('SP13'). His evidence showed that the R & M through Dato' Robert Lim knew about the plight of the sub-purchasers. This was what he said (see pp 417–419 of the appeal record B1):

> The biggest problem pertaining to the receivership was the question of the land that had been sold to the people. It was also a social problem. Dato' Robert and I had several discussions over this issue and came out with some objectives how to handle this problem.
>
> First objective was a speedy recovery of moneys to the debenture holder ie MBF Finance. Second objective was to resolve the social issue of the many people involved and claiming the land. We also decided on an in depth study and to determine who would buy the property.
>
> Some of the sub-purchasers visited our office after this tender advertisement appeared. Dato' Robert Lim and I met them. One Mr. Muniandy came to our office with 2 others. Only Mr. Muniandy took part in the meeting. Mr. Muniandy said that he was the Chairman of the protem Committee of the sub-purchasers in SEP and that he represented them. He said that the sub-purchasers wanted to buy the land.
>
> Dato' Robert Lim was sympathetic and that he would try to help them but did not make any promises.
>
> After meeting with Mr. Muniandy, Dato' Robert and I discussed and we thought that the best solution was to sell the property to the sub-purchasers.
>
> Dato' Robert instructed me to keep him fully informed in all details regarding the property at all time.
>
> Saksi ditunjukkan P1 — 1.9.1992 (Valuation Report by Colliers).
>
> Dato' Robert instructed me to have a valuation done and I contacted Colliers.
>
> P2 (Valuation Report oleh Colliers, 25.1.1994) ditunjuk kepada saksi.

Rujuk 'basis of valuation' di ms 22 & 23 Esbt P1.

Saksi dirujuk juga kepada P3 — ms 11 & ms 12 (Valuation oleh CH Williams, Talhar & Wong) bertarikh 27.10.1992.

P3 was also prepared on instructions to valuers.

The several tierred valuation is not the usual form of valuation. We chose this format of valuation to reflect the true position and the condition of the property subject to all these prevailing things. We had to have the range of values for R & M to base his decision, as a basis when we received the tenders. It would enable us to make a sound decision on the prices offered on the tender exercise.

The interest of the sub-purchasers are reflected in the valuation reports. Dato' Robert wanted a valuation taking into account that a large section of the property had been sold. We asked for a valuation that took into account the purchasers' interest.

[302] At the Simpang Empat Barathi Tamil School, SP14 met the sub-purchasers. For this purpose, two meetings were convened. It was during the second meeting that the first defendant turned up and what transpired at that meeting was lucidly narrated by SP14 in this way (see pp 463–464 of the appeal record B1):

Some time later we had another meeting at the same place. The persons who went to the Land Office report at this meeting. We were told that they had met one lawyer, Mr. Gurbachan Singh to act as our lawyer. We were told that Mr. Bachan had requested for a meeting with the sub-purchasers. At that time we had already arranged a meeting with Mr. A. Rengganaten the MD of SPPK at his office on 30.8.1992. We then invited Mr. Bachan to attend that meeting. Mr. Bachan came and met with Rengganaten. Mr. Bachan spoke to some purchasers outside the office and told us that he has agreed to be our lawyer and told us not to worry. That was the first time I had met Mr. Bachan. I spoke with him on behalf of the sub-purchasers and told him to act as our lawyer and told him to get back the land for us. I assured him that we will pay all the necessary fees to get back the land for us. I said we will raise the 10% deposit from the sub-purchasers. Mr. Bachan told us the auction might not go on. He will keep us inform if the auction were to go on and we (sic 'he') will do the necessary.

[303] After the first defendant put in a bid in his own name, he then informed SP14 about it. SP14 was not too pleased at what the first defendant had done. This was what SP14 said in his testimony (see pp 464–466 of the appeal record B1):

After this, he called me and said that he had put a bid in his name and asked me to send a letter to MBF. He asked me to collect a draft letter from his KL office. I was surprised and asked Mr. Bachan how could he make a bid in his name. He said he could not do it under the sub-purchasers' name because according to law the bid has to be only in one person's name. So he decided to use his name. I asked

him about the 10% deposit. He said he has advanced the deposit and told me 'Let's get the land first'. I then went to his KL office to collect the draft copy of his letter sent by fax.

Saksi kemukakan deraf surat bertarikh 14.9.1992 daripada Bachan and Kartar kepada R & M dan ditanda Esbt P.62.

Draf surat daripada Protem Chairman kepada MBF Finance bertarikh 17.9.1992 dikemukakan ditanda P.63.

I was not happy with the letter P.62, that Mr. Bachan sent to the R & M. I was not willing to send the letter, as in P.63, to MBF. I told Mr. Bachan that I did not agree to send that letter. He then called me to his office in Ipoh. I went there. He then gave me a printed copy of the draft, P.63 and have it sent to MBF.

Saksi kemukakan 'printed copy' ditanda P.63A.

I did not send this letter. I was not happy with one paragraph in Mr. Bachan's letter — P.62.

Saksi ditunjuk surat Bachan and Kartar di ms 47 AB-1.

Yes, the paragraph I was not happy with is identical to para 6 on page 47. 2 points that I was not happy with. One was regarding fresh agreements we have to make to buy property from Mr. Bachan. Secondly was to pay the balance purchase price under the agreements with SPPKB, whereas we don't owe SPPKB anything. I told Mr. Bachan why I was unhappy. He insisted that I sent the letter and told me that this is the only chance to get back the land. He told me 'Let's get the auction through' and to leave the matter with him, he being a lawyer, he knows better. I could not argue with him. I collected the printed draft copy and I told him I will think about it. I did not send that letter to MBF.

After that, the next time I met him was in relation to P.18. P.18 B, the SD, was drafted by Mr. Bachan himself.

In October 1992 I had to stand down as protem Chairman because of my commitment in KL. I had no further contact with Mr. Bachan after that.

[304] The first defendant successfully bidded at the first auction. He was the sole bidder at the first auction. But that first auction was aborted because SP8 had obtained an ex parte injunction preventing that first auction from proceeding. The injunction order was set aside on 23 December 1993 as per exh D145.

[305] Once again in 1994, the land was advertised for sale by tender for the second time as reflected at p 147 of the appeal record C5 and it was worded in this way:

NEW STRAITS TIMES, FRIDAY, JANUARY 7, 1994

SALE BY TENDER

Tenders are invited for the purchase of the following property belonging to a plantation company on an 'as is where is' basis.

1. Plantation Land and Building

Title: Pajakan Negeri 35553 (Lot No. P.T. 125)

Locality: Mukim of Hutan Melintang, Perak

Tenure: Leasehold term of 60 years expiring on 10th October 2042.

Area of Lot: 1,490 Hectares (810 Hectares planted with Oil Palm, 680 Hectares of jungle land)

Category of Use: Agriculture

2. Vehicles/Machineries

(Comprise of a Motorcycle, a tractor, a mist blower and two water pumps).

All tenders on the approved forms are to be sealed and submitted to the Receivers and Managers to reach them by 5.00 pm on 4th February, 1994. Late tenders will not be entertained.

For tender forms and further details, please contact:

c/o Ernst & Young

35, Jalan Hussein

30250 Ipoh, Perak

Tel No. 05-511255, 511563

(Mr. Gary Lee Yin Fei/Mr. Charlie Lim Chor Lein)

ERNST & YOUNG.

[306] At this juncture, it would be appropriate to set out the events that led to the filing of the current litigation by the plaintiffs. For this purpose, it would be sufficient to refer to the evidence of SP11 as seen at pp 371–378 of the appeal record:

In 1994, I came to know that there was another auction on the said land. A few land owners and I had gathered and discussed and arranged that 2–3 of us to go to see the lawyer. I was informed that the lawyer will come on 30.1.1994 at Hutan Melintang Tamil School. The lawyer was Mr Bachan. There was a meeting on 30.1.1994 and Mr Bachan was present. There were 180 people were present at the said meeting. Mr Bachan talked to us. He informed us that the land will be auctioned and he addressed as a lawyer to the Committee.

We did discuss this matter. He will try to get the land from being auctioned. Mr Bachan said as a lawyer, he will try to save the land from being auctioned. We didn't want the land to be auctioned. We wanted to take the said auction.

Mr Bachan told us that we needed around RM4.1 million. All the sub-purchasers agreed to bid for the tender at that price. According to Mr Bachan, at that sum, the price of one acre was around RM1100/-.

Before this, we had agreements with SPPKB and in there, it was fixed how many acres each sub-purchaser will get under the tender for RM4.1 million. True, we will get the same land mentioned in the agreement. We told Mr Bachan that the cost to take the tender including the lawyer's fees was around RM1200 per acre.

We did discuss about the deposit payment before paying the tender price. The lawyer told that we must pay 10% of the tender price. We were given a period of 4 days to arrange the deposit money.

The 4 days period was informed by Mr Bachan. He informed that for each lot, must pay RM1000/- and whoever have more, can pay more. For those who have paid more than RM1000/- and if less payment was made, they should settle it after the auction. Those who can't afford it, can take a bank loan to pay.

There were questions asked about the tender during the meeting. There were questions asked about the vacant land which was not taken by the sub-purchasers. Mr Bachan replied that the vacant land will be taken by him at a reasonable price. There were questions asked about the payment already made under the agreement with SPPKB. There were some who said that they have paid different sum, there were RM5000 per lot and RM10,000 per lot. They asked whether they should pay RM1200 per lot. Mr Bachan said that now we only want to get back the land from the auction and don't involve the agreement with SPPKB. He said that payment to SPPKB had lapsed.

Mr Bachan said that he will buy part of the land at a reasonable price, then we can pay the sum paid by Mr Bachan for part of the land, the balance can be obtained by charging the land to a bank as the value of the land 4 times of the price of RM4.1 million.

We will pay back according to size of the property mentioned in the original agreement, at the price RM1200 per acre.

For my part of the land, I had paid RM1000/- for the tender price. I have 3 lots. It measures 9 acres. The price for 3 lots was RM10,800. The sum of RM1000/- which I had paid will be taken into account for the whole sum that I should pay. I have to pay the balance of RM9800 for the bank loan. If I have paid RM5000, I need to pay the sum of RM5800/- for the bank loan.

Payment for the bank loan was discussed during the meeting. If the land was charged to the bank, we can work on the land and the income can be used to pay the bank each month.

It was discussed on whose name the land will be registered after purchasing via the tender. A company will be formed and 4 - 5 people will be appointed as directors. The purpose to form a company was to get the bank loan. The land will be registered in the said company's name. One by the name of M.A. Vadiveloo was present at the meeting. He was a lawyer. He said that he had taken the tender form. He made suggestion regarding the form. He said that among us, 4 or 5 names will be filled in the tender form. Mr Bachan said that he had become our lawyer and that he will bid for the tender and asked others not to write any tender. We agreed that Mr Bachan bid for the tender and let the others not to bid for the said tender.

I sent 10% which amounts to RM1000/- through a friend named Ramasamy because at that time, I was busy.

Mr Ramasamy told me that on 2.4.1994 a meeting was held regarding the land and the tender. The meeting was for 2 days, 2.4.1994 & 3.4.1994. I attended the said meetings. Around 150 were present. Mr Bachan was also present and he addressed the meeting. He informed us that he was successful in the tender and the land was in his name. We were shocked when we heard this. Mr Bachan offered to sell the land to us. He informed us that he will sell the land that we bought from Rengganaten. He asked for the balance payable to Mr Rengganaten. I meant the agreement with SPPKB. I was shocked when I heard this. We don't have to pay to SPPKB. Because of that we were shocked with Mr Bachan's offer. What was discussed and decided on 30.1.1994 was in contradiction with what Mr Bachan told us on 2.4.1994. One of us questioned Mr Bachan. I can't remember the name. Mr Bachan said what he said was the decision, if you all are confused, I will come and discuss again tomorrow.

After Mr Bachan left the meeting, we discussed among us and made a decision that what was decided on 30.1.1994 should be enforced by Mr Bachan. Mr Bachan did say on 2.4.1994 that the bid price for the auction was for RM4.8 million. This matter was discussed after Mr Bachan left the meeting. We decided to pay a sum of RM4.8 million and take over the said tender.

On 3.4.1994, the meeting took place and Mr Bachan was present. Our decision on 2.4.1994 were informed to him. He said that his decision was final and that we should listen to what he said and that the tender was still under his name. Mr Bachan said that all of us are uneducated and stupid, the committee members also stupid. He said that very rudely. When he said that, all members stood up and quarrelled with Mr Bachan. Mr Bachan took his bag and left the meeting place. He told us, 'Lu orang macam mana jadi pun, jadilah!'.

After he left us, we discussed what we should do. We decided to engage another lawyer to settle this case. Now, I am aware about the case against Mr Bachan. I agreed to file this case against Mr Bachan. My purpose was to defend my right. Vide this suit, I hope to get back my land. This is important because it is my family property.

[307] The protests of the sub-purchasers went unheard. The first defendant proceeded to transfer the land in his name. The first defendant set up a company known as Regal Establishment Sdn Bhd — the fourth defendant ('Regal') with his wife and a friend by the name of Manjeet. All three of them became directors of Regal. The first defendant then transferred the land to Regal. The first defendant did not stop there. He then sold Regal as an entity together with the land to two Chinese companies. The land is currently in the name of Regal. And the directors of Regal are no longer his wife and friend. However, under cross-examination, the first defendant testified that he is still a director of Regal (see p 594 of the appeal record B2).

ANALYSIS

[308] The memorandum of appeal alluded to the equitable rights of the sub-purchasers. The facts as narrated also established an unbroken chain of the sub-purchasers' rights.

[309] Exhibits P38 (the payment receipt of the sale of the land from Nam Bee to SPPKB), P40 (the declaration of trust dated 18 December 1981 between Tan Ah Loong, a director of Nam Bee, and SPPKB as seen at pp 1767–1771 of the appeal record C1) and P41 (the supplementary agreement between Nam Bee and SPPKB dated 22 August 1985 as seen at pp 1772–1774 of the appeal record C1) established that the land originally purchased by SPPKB was later registered in the name of SEP through a legal process as explained by SP8 in this way (see pp 242–243 of the appeal record B1):

> SPPKB could not transfer the land to our company's name, therefore an arrangement was made to transfer the land to SEP. When I asked the Land Office people, they told me that the land cannot be transferred. It is because our company and NB had separate directors. The transfer can be made if NB forms a subsidiary company.
>
> SEP was formed as a subsidiary of NB. The said land was transferred from NB to SEP. The director of NB and SEP were same. We always contact and discuss regarding the said land. During registration, the directors of NB & SEP were maintained. After registration, the directors of SEP were replaced by SPPKB's directors.
>
> After P40 was made, an agreement was entered between NB and SPPKB. I signed one agreement as director of SPPKB. Dated 22.8.1985.
>
> Agreement marked as Exhibit P41.

[310] The letter in exh 'D14' has reproduced earlier shows that SEP was responsible for all the agreements made by the sub-purchasers with SPPKB. That would mean that SEP took the land subject to the beneficial rights of the sub-purchasers.

[311] An argument was advanced that MBf had no actual knowledge of the existence of the sub-purchasers. Indeed, the statement of defence of MBf averred that MBf were bona fide purchasers for value without notice. Sadly, MBf merely alleged but failed to adduce evidence that they did not have notice of the sub-purchasers' rights. It goes without saying that the burden of proof must lie on MBf to establish its defence.

[312] In fact, there was ample evidence to show that MBf had notice. SP8's evidence would categorically show that MBf had the necessary notice of the existence of the sub-purchasers (see pp 256–257 of the appeal record B1):

> As regards to the loan from MBF. Before it was approved, a few officers from MBF came to inspect my office and the estate. One Mr Lee Eng Kiang was leading the MBF group. He inspected the estate. Some sub-purchasers were working in the estate at that time. Mr Lee asked me who are those people and I explained to him that they were the sub-purchasers. Mr Lee did not ask me anything else.

I told Mr Lee that those people were the sub-purchasers and that we were having some financial problem to develop the land I asked for help from Mr Lee.

Mr Lee came to my site office in the estate and he examined a plan of the estate and he asked me a few questions regarding the plan. The plan showed the land development and the sub-purchasers plot.

[313] Lee Eng Kiong ('SD17') gave evidence as seen at p 1048 of the appeal record B3 and this was what he testified in his examination-in-chief:

I remember Simpang Empat Plantation S.B. (SEP). I remember SEP applied for a loan from MBF Finance. When I left MBF, the loan was not yet approved. I went for the inspection of the estate upon directive of senior management. I visited with the MBF branch manager and a director of SEP i.e. Mr. Rengganaten. I saw some oil palm trees and some bushes, that's all. I did not go into the plantation. The land was quite muddy and so we looked from quite a distance. I did not see anyone in the plantation. I did not ask the director of SEP anything about the plantation and he did not tell me anything about it. I did not prepare a report but only reported verbally to my management. I left MBF in early 1991.

[314] SD17 testified that he went to inspect the plantation but he 'did not go into the plantation'. Yet he had the audacity of saying that he 'did not see anyone in the plantation'. SP8, on the other hand, testified that SD17 saw some sub-purchasers working on the plantation and SD17 enquired as to who they were. In weighing the evidence of SD17, one must take into consideration the following salient factors, namely:

(a) that SD17, in his examination-in-chief, did not deny any knowledge of the existence of the sub-purchasers and neither was he asked specifically about them;

(b) as the then credit manager of MBf, SD17's method of inspecting the plantation leaves much to be desired;

(c) Jaya Letchumi ('SD8'), in her examination-in-chief, testified that the land was previously sold to sub-purchasers, yet SD17 merely turned a blind eye to the existence of the sub-purchasers;

(d) that SD17 admitted under cross-examination that he went to view the plantation physically in order to verify that the property existed; and

(e) SD17 also said under cross-examination that he was not aware if there was any further inspection on the property before the loan was approved.

[315] There was a blatant failure on the part of MBf to call the relevant officer who had processed the loan. That officer would certainly be in a position to attest as to the knowledge of MBf in regard to the existence of the

sub-purchasers on the land. To aggravate the matter further, the branch manager who accompanied SD17 was not called to testify.

[316] It was rightly submitted that MBf had not taken the burden of proof that lies upon it seriously. Indeed it has been demonstrated that MBf through either a lack of respect for the process of the law or just being plain complacent in not discharging the burden that falls upon it to discharge its defence of establishing that they were the bona fide purchaser for value without notice.

[317] It must be borne in mind that the land was always vested in the name of SEP. It was never vested in the name of MBf.

[318] MBf on its own volition chose not to proceed with its charge on the land. MBf categorically stated that they withdrew their charge.

[319] It must be recalled that MBf had appointed the R & M to take over the affairs of SEP. But the R & M acted under a debenture and that is not recognised under the National Land Code ('NLC') as a dealing. And when action was taken by the R & M to sell the land, the land was sold with SEP as the vendor. The powers of the R & M are limited under cll 23 and 24 of the debenture (see p 328 of the appeal record C5). However, the position might be different if MBf had proceeded to enforce its charge under the NLC. And if MBf proceeded under the NLC, then the rigours of the NLC would be put into motion. At this juncture, the speech of Edgar Joseph Jr FCJ in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 at p 823, merits reproduction. There His Lordship succinctly said:

> In our view, therefore, the provisions of the Code as to the rights of chargors are designed for their protection and cannot be waived; nor can the chargor contract himself out of the Code. It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owner. With respect, we must therefore hold that the case of *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd* [1986] 1 MLJ 75 — in so far as it decides to the contrary — was wrongly decided.

[320] In short, MBf should have sold the land by way of a public auction by obtaining 'a judicial sale in accordance with the rigid procedure laid down

in the Code'. As it stands now, MBf's charge under the NLC was never effectuated and it has no bearing in this appeal. There was no land code dealing in the land by reason of the MBf charge. This meant that the land remained throughout in the name of SEP and the rights of the sub-purchasers must be held to be valid and subsisting as against SEP and all those who took the title from SEP.

[321] When the R & M arranged the sale of the land by private tender as opposed to public auction, the successful bidder was none other than the first defendant. The R & M accepted the first defendant's bid at the second auction and an agreement was then made to sell the land to the first defendant. I must categorically hold that the sale of the land to the first defendant did not break the equitable rights of the sub-purchasers for the following reasons:

(a) The MBf charge is invalid because it was registered without the prior consent of the relevant state authority and that would be the Menteri Besar. The deed of debenture as seen at p 328 of the appeal record C5 makes it abundantly clear that such consent is a pre-requisite. Clause (H) of the deed of debenture at p 331 of the appeal record C5 stipulates that 'written confirmation from the relevant state authorities on the consent to create a charge of the said property by the borrower to the lender' while cl (l) of the deed of debenture at p 332 of the appeal record C5 stipulates that 'all the express conditions of the title must be met'.

(b) To add salt to the injury, MBf together with the rest of the defendants took the bold stand that the consent of the Menteri besar was not necessary. Their only source of authority for this absurd proposition came from one Razman who said that someone at the state legal advisor's office had told him so. But, unfortunately, no one from the state legal advisor's office was called to give evidence. Razman himself, for that matter, did not know the specific person in the state legal advisor's office. And since the transfer and registration of the land are invalid and void, the defendants cannot override the equitable rights of the sub-purchasers.

(c) Since the first defendant was fully aware of the rights of the sub-purchasers he cannot be a bona fide purchaser for value without notice. This would mean that the first defendant must be bound by the sub-purchasers equity.

[322] The general principle of equity is legion. It requires a person in a fiduciary relationship to account for personal benefit or gain. The doctrine is often expressed in this way. That a person 'is not allowed to put himself in a position where his interest and duty conflict' (*George Bray v John Rawlinson*

Ford [1896] AC 44 at p 51 (HL); or 'may conflict' (*Boardman and another v Phipps* [1967] 2 AC 46 at p 123); or that a person is 'not to allow a conflict to arise between duty and interest' (*New Zealand Netherlands Society 'Oranje' Incorporated v Laurentius Cornelis Kuys and another* [1973] 1 WLR 1126 at p 1129).

[323] Two general principles of importance must be advanced. The first would be this. It centres on the appropriation for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty of a significant possibility of such conflict and the principle objective is simply to preclude the fiduciary from being swayed by considerations of personal interest. The second takes this form. It requires the fiduciary to account for any benefit or gain obtained or received by reason of or by using his fiduciary position or of opportunity or knowledge resulting from it. The sole objective is to preclude the fiduciary from actually misusing his position for his personal advantage.

[324] Put differently and in a comprehensive manner in terms of the liability to account, the principle of equity is rather simple. A person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain which has been obtained or received in circumstances where a conflict or a significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or which was obtained or received by use of or by reason of his position or of opportunity or knowledge resulting from it. And according to the case of *Keith Henry and Company Proprietary Limited v Stuart Walker and Company Proprietary Limited and another* (1958) 100 CLR 342 at p 350, any gain or benefit is held by the fiduciary as constructive trustee.

[325] Now, constructive trust arises from the fact that a personal benefit or gain has been so obtained or received and it is immaterial that there was no absence of good faith or damage to the person to whom the fiduciary duty was owed. In some cases, the constructive trust will be consequent upon an actual breach of fiduciary duty. A classic example would be the situation of an active pursuit of personal interest in total disregard of fiduciary duty or a misuse of fiduciary power for personal gain.

[326] It seems to me, after reading a host of authorities, that the general principle requiring a fiduciary to account for a personal benefit or gain are framed in general terms like 'inflexible', 'inexorably', 'however honest and well-intentioned', 'universal application' to indicate the precise effect which the existence of a conflict with personal interest has had upon the

performance of fiduciary duty (per Lord Eldon in *James, Ex parte* (1803) 32 ER 385; (1803) 8 Ves Jun 337 at p 345; and per Rich, Dixon and Evatt JJ in *Furs Ltd v Tomkies and others* (1936) 54 CLR 583 at pp 592–593). A

[327] In the context of the present appeal, the first defendant can be described as the fiduciary. I have more to say about fiduciary relationship in the later part of this judgment. B

[328] Reverting back to the mainstream of the present appeal, I have this to say. The registered ownership of the land to Regal is equally tainted. Regal was a shell company taken over by the first defendant and was essentially his alter ego. He took Regal specifically to transfer the land which was in his name to Regal. The first defendant was the promoter, shareholder and director of Regal. It is our judgment that the transfer of the land in the name of Regal does not break the equity of the sub-purchasers because Regal through the first defendant had full knowledge of the equitable rights of the sub-purchasers of the land. C D

[329] It was submitted that the veil of incorporation should be lifted in order to attribute to Regal the knowledge and notice that the first defendant possessed in regard to the sub-purchasers' rights. In *Littlewoods Mail Order Stores Ltd v McGregor (Inspector of Taxes); Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners* [1969] 3 All ER 855(CA) at p 860; [1969] 1 WLR 1241 at p 1254 (CA), Lord Denning MR had this to say: E

> The doctrine laid down in *Salomon v SaIomon & Co Ltd* [1897] AC 22; [1895–99] All ER Rep 33 has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. F G

[330] In *Wallersteiner v Moir, Moir v Wallersteiner and others* [1974] 1 WLR 991 (CA), it was held that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. H

[331] In *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 at p 112, Salleh Abas FJ (as he then was) had this to say about the question of the court lifting the veil of a corporation: I

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in common law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift 'the veil of incorporation' (so the

A expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or vice versa as was decided in *Smith, Stone and Knight Ltd v Lord Mayor, Aldermen and Citizens of the City of Birmingham* [1939] 4 All ER 116; *Re FG (Films) Limited* [1953] 1 WLR 483 and
B *Firestone Tyre & Rubber Co v Llewelyn* [1957] 1 WLR 464.

[332] When the courts lift the veil, it does so in order to do justice. In lifting the corporate veil, all the transactions from SEP to Regal were done
C with the full knowledge of the sub-purchasers' rights.

[333] It is always justice and justice necessitates the lifting of the corporate veil. It is wrong to say that the veil of incorporation is completely impenetrable. It is penetrable and the courts can and have on occasions
D pierced it and looked at the persons controlling the company. A good example would be the case of *Jones and another v Lipman and another* [1962] 1 WLR 832. In that case, Lipman agreed to sell a house to Jones. For some reason he changed his mind. To avoid having to transfer the house, Lipman set up a company called Alamed Ltd and transferred the house to it. Alamed
E Ltd was wholly owned and controlled by Lipman. His solicitors then wrote to Jones' solicitors offering to pay damages for the breach of contract. Jones sought an order of specific performance. The defence was raised to the effect that Alamed Ltd was not a party against whom specific performance could be ordered. Russell J, declined to accept this argument. His Lordship stated that
F Alamed Ltd was 'the creature of (Lipman's), a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity'. Both Lipman and the company were ordered by His Lordship to specifically perform the contract to sell the house.

G **[334]** Another example would be the case of *Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd* [1984] 2 MLJ 313 which was affirmed on appeal vide *Datuk Hong Kim Sui v Tiu Shi Klan & Anor; Albert Teo Chin Kion v Tiu Shi Klan & Anor* [1985] 1 MLJ 145 (FC) and, finally, it went up to the Privy Council (*Datuk Hong Kim Sui v Tiu Shi Kian & Anor* [1987] 1 MLJ 345).
H That was a case where the plaintiffs ran the Golden Million Cabaret and Night Club in the Red Rose Restaurant. The Red Rose Restaurant Sdn Bhd ('Red Rose') was wholly owned and controlled by Hotel Berjaya Sdn Bhd ('Hotel Berjaya') which owned the hotel in which the restaurant was situated. A dispute arose between the plaintiffs and Red Rose regarding the renewal of
I the plaintiffs' licence to operate the night club. The plaintiffs obtained an interlocutory injunction restraining Red Rose from interfering with their business until the action was tried. One night the plaintiffs found that the restaurant premises were locked, in breach of the injunction. The plaintiffs then sought an order of committal for contempt of court against the directors

of Red Rose. It was pleaded that it was not Red Rose which locked up the restaurant, but Hotel Berjaya. The judge found this to be a transparent device to defeat justice and held that Hotel Berjaya and Red Rose were fundamentally one entity. His Lordship accordingly held that there had been a contempt of court.

[335] Here, it was pleaded that the land has been unlawfully registered in the name of Regal and it was also pleaded that the land has been unlawfully transferred to Regal without the consent of the Menteri Besar. It was also pleaded that the first defendant and/or Regal after taking over the said land have been deriving profits from the said land which profits the plaintiffs were entitled to. The plaintiffs also pleaded that the transfer of the land to Regal be declared null and void. It was because of these averments that the learned counsel for the plaintiffs craved the court's indulgence to pierce the corporate veil of Regal. And, I am of the considered view that, the justice of the case demands that the veil of incorporation be pierced.

[336] Yet another example would be the case of *Re a Company* [1985] BCLC 333 (CA). That was a case where the defendant was sued by the plaintiff companies for breach of fiduciary duty and deceit. The evidence disclosed that the defendant had brought into operation a complicated scheme whereby his personal assets were organised in such a way that they were held by foreign and English corporations and trusts in a manner that effectively concealed his beneficial interest in those assets. This network of corporations was used as a device to prevent the plaintiffs from realising the fruits of the proceedings, which proceedings the defendant had anticipated. In the interlocutory proceedings, the High Court made a series of orders where Mareva injunctions were imposed upon the defendant restraining the defendant from disposing of his interests in his network of corporations and, at the same time, restraining him from directing or procuring disposal or charge of English assets by any such corporation. The defendant appealed on various grounds. Foremost was the ground that the defendant had no interest in the assets of the corporations. It was submitted on the defendant's behalf that only if the network of corporations was a complete sham could the court pierce the corporate veil. Cumming-Bruce LJ delivering the judgment of the Court of Appeal rejected the defendant's submission. His Lordship said that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration.

[337] Now, the High Court arrived at the following conclusions:

(a) At p 36 of the appeal record, the High Court held that SPPKB was never registered as owner of the land and therefore could not transfer any legal or equitable rights to the plaintiffs. And at p 39 of the appeal

record, the High Court asked this question, 'How could SPPKB describe itself as a vendor of the said land in its agreements with the plaintiffs, when in fact they have never acquired any title in it?'

(b) The High Court refused to accept the nexus between Nam Bee and SPPKB and SEP despite the existence of probative evidence to prove the nexus. The High Court refused to lift the corporate veil and also held that one of the documents to assist and expedite that nexus, that is exh P45 was inadmissible because it was not stamped.

(c) The High Court also held that the agreements between SPPKB and the sub-purchasers were illegal and void because they contravened s 214A of the NLC.

[338] The defendants mounted an attack by arguing that SEP was not bound by the agreements between SPPKB and the sub-purchasers. If the High Court lifted the corporate veil, the nexus between SPPKB and Nam Bee and SEP and the sub-purchasers of the land can readily be appreciated. I have demonstrated by referring to some case authorities to show that the courts have, time and again, lifted the corporate veil in aid of the aggrieved parties when corporate manoeuvrings by corporations seek to deny the legitimate rights of the aggrieved parties.

[339] At the local scene, lifting the veil of incorporation can be seen in *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 (FC) and in *Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 (CA).

[340] I must emphasise that the prior equitable rights of the sub-purchasers emanating from their contractual agreements with SPPKB must prevail over all subsequent dealings in the said land. It would not be out of place to say that on 5 December 1979, SPPKB paid a deposit totalling RM51,000 to Nam Bee as part payment of the purchase price of the land. A payment receipt was issued for this purpose as seen in exh P38 that was reproduced earlier. Then on or about 18 December 1981, a declaration of trust in exh P40 as seen at p 1767 of the appeal record C1 was executed between Tan Ann Loong and SPPKB. Tan Ann Loong was certainly not acting on his own because the second preamble to the declaration of trust categorically states that he is acting on behalf of Nam Bee with the support of the board.

[341] Then we have preambles 'A' to 'G' to the declaration of trust which set out the process wherein the land belonging to Nam Bee would be paid for by SPPKB and eventually transferred to SEP. This would be followed by exh P45 which was an agreement between Nam Bee and SPPKB as seen at pp 1803–1810 of the appeal record C1. Again preambles '1' to '6' of exh P45

clearly listed the procedure that has to be followed. And when we consider exh P38, we have to take into account preamble 4 of exh P45 as seen at p 1805 of the appeal record C1 which reads as follows:

> 4. By an agreement (hereinafter called the 'said agreement') made on or about the 5th day of December, 1979 between Nam Bee and SPPKB (Syarikat Pembinaan Perusahaan Kemajuan Berhad), Nam Bee agreed to sell and SPPKB agreed to purchase the said land at the agreed price of $3,204,080.00 (Ringgit: Three Million Two Hundred and Four Thousand and Eighty) subject to obtaining the requisite permission.

[342] Exhibit P45, in fact, was an agreement to vary the terms of exh P38. And the irony of it all is this. That exh P45 itself was varied by exh P41 to the extent that the balance was to be paid on the extended time.

[343] The sting of exh P45, can be seen in the clauses stipulated therein. I shall now reproduce those clauses (see p 1806 of the appeal record 'C1' and pp 1807–1808 of the appeal record 'C1'):

> 2. agrees to purchase from Nam Bee the said Land at the new agreed price of $3,520,000.00 (Ringgit Three million five hundred twenty thousand).
>
> 3. Nam Bee hereby acknowledges and confirms that it has received from SPPKB a total sum of $1,311,000.00 (Ringgit One million three hundred and eleven thousand).
>
> 4. SPPKB hereby acknowledges and confirms that it has entered into possession of the said Land since the 5th day of December, 1979 and has been in possession thereof since that date.
>
> 6. SPPKB hereby agrees and undertakes that it will do or cause to be done the following acts and things:
>
> (a) Purchase from Nam Bee and Tan Ann Loong all their 100,000 and 100,001 shares respectively in Simpang Empat at the agreed price of $3,520,000.00 (Ringgit Three million five hundred twenty thousand) of which the sum of $1,311,000.00 (Ringgit One million three hundred and eleven thousand) already paid by SPPKB to or on behalf of Nam Bee shall be deemed to be in part payment of such shares; and
>
> (b) Pay to Nam Bee and Tan Ann Loong the balance of $2,209,000.00 (Ringgit Two million two hundred and nine thousand) in equal shares by 12.00 noon on the 28th day of February, 1985.
>
> 7. As security for the payment of the balance of $2,209,000.00 (Ringgit Two million two hundred and nine thousand) to Nam Bee and Tan Ann Loong, SPPKB hereby agrees and undertakes that it will, immediately after the transfer to SPPKB of Nam Bee's 100,000 shares and Tan Ann Loong's

100,001 shares respectively in Simpang Empat, do or cause to be done the following acts and things:

(a) Execute and cause to be executed transfers of all the issued shares in Simpang Empat to Nam Bee (100,000 shares), Tan Ann Loong (100,001 shares) and Tan Onn Hong (1 share);

(b) Cause to be passed by the board of directors of Simpang Empat a resolution appointing Tan Ann Loong and Tan Onn Hong directors of Simpang Empat, and

(c) Cause to be executed by the two directors of Simpang Empat nominated by SPPKB pursuant to Clause 5(f) hereof letters of resignation from the board of directors of Simpang Empat;

(d) Deposit with Nam Bee the following documents:-

(i) a resolution of the board of directors of SPPKB authorising the deposit of all its shares in Simpang Empat with Nam Bee as security for the repayment of the balance of $2,209,000.00 (Ringgit Two million two hundred and nine thousand);

(ii) a memorandum of deposit of the said shares in such form as Nam Bee's solicitors may prescribe;

(iii) the transfers mentioned in Clause 7(a) hereof;

(iv) the share certificates in respect of all the issued shares in Simpang Empat;

(v) the resolution mentioned in Clause 7(b) hereof; and

(vi) the letters of resignation mentioned in Clause 7(c) hereof.

8. SPPKB also hereby agrees that until the full purchase price of $3,520,000.00 (Ringgit Three million five hundred and twenty thousand) has been received by Nam Bee, SPPKB shall cause the present secretary of Simpang Empat, namely Mr. Chan Chee Kah of Nos. 6–8, Jalan Gereja, Kuala Lumpur, to be retained as the only secretary of Simpang Empat.

[344] The main complaint of the defendants in regard to exh P45 was that it was not stamped and so must be considered as inadmissible. The High Court was of the same view.

[345] There was an initial objection by the defendants in regard to exh P45 as reflected at p 312 of the appeal record B(1) and later the High Court marked ID45 as exh P45 as seen at p 317 of the appeal record B(1). Learned counsel for the plaintiffs submitted that because the defendants withdrew their objections and agreed to mark it as exh P45 that was why the High Court marked it as such, namely, as exh P45. Indeed the conduct of the defendants was, to say the least, very prejudicial.

[346] Now, when an objection is taken in regard to the admissibility of a document as being unstamped, the Stamp Act 1949 (Act 378) gives an option to admit the document by paying the duty and the penalty imposed on the said document. Thus, proviso (a) to s 52 of the Stamp Act 1949 (Act 378) would come in handy for the benefit of the plaintiffs and that proviso states as follows:

> (a) any such instrument shall, subject to all exceptions, be admitted is evidence on payment of the duty and the penalty, if any, chargeable in respect thereof under section 43 or section 47A.

[347] It is interesting to mention that the stamp duty on an agreement like exh P45 would have been RM10 and the penalty imposed would have been four times more and the total would come to RM50. According to the plaintiffs, if the defendants had maintained their objection, the plaintiffs would have paid the requisite duty and penalty and the admission of exh P45 would be smooth sailing. Since the defendants withdrew their objection as to the marking of exh P45, it had created a situation, nay correctly, where all the parties including the High Court assumed that exh P45 was an admitted document. Estoppel doctrine would surely be activated to the detriment of the defendants. At common law, the basic idea of estoppel would be to preclude a man from denying the existence of a state of affairs which he has previously asserted. It is the rule that there would be an estoppel where by words or conduct there had been a representation of existing facts (*Jorden v Money* (1854) 10 ER 868; (1854) 5 HLC 185; *Elizabeth Maddison v John Alderson* (1883) 8 App Cas 467 (HL) and *The Hon Henry Neville, John Robinson, and Henry Shelley, Esqrs v John Wilkinson* (1782) 28 ER 1 Bro CC 543) which was intended to be acted upon and was in fact acted upon to his prejudice by the person to whom it was made (*Canadian Pacific Railway Company v The King, on the information of the Attorney-General for Canada* [1931] AC 414 at p 429 and *Dean v Bruce* [1952] 1 KB 11).

[348] It was argued that the rights of the sub-purchasers are not solely dependent on exh P45. Now, what the sub-purchasers have to show would be the process by which the land passed from Nam Bee as the proprietor to SPPKB as the beneficial owner and then flowing to SEP as the registered owner. In this way, the plaintiffs have shown that SEP took the land with all the liabilities as the constructive trustee for SPPKB and the sub-purchasers. And these pertinent facts can be seen from exhs P38, P40 and P41 without having to consider exh P45.

[349] Assuming for one moment that exh P45 is inadmissible, then the transaction as outlined in the declaration of trust in exh P40 did take place

A and it would certainly be in favour of the plaintiffs. Indeed, exhs P38, P40 and P41 clearly show the mechanism by which SEP became the owner of the land.

B **[350]** I have to apply the maxim that equity looks upon that as done which ought to have been done. In this context, this court speaking through Gopal Sri Ram JCA (now FCJ) in *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157 had this to say at pp 182–184 of the judgment:

C

> It is the fourth instance with which I am concerned in the present case. It is based on the maxim that equity deems that as done which ought to be done. The doctrine has been applied in Malaysia on several occasions within the framework of the National Land Code 1965.
>
> D In *Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, intervener)* [1998] 5 MLJ 162, Abdul Malik Ishak J applied the doctrine by giving effect in equity to an unregistered and unregistrable agreement which was void as a lease at law. I quote with approval the following passage from his judgment (at p 182A–F of the report) in which he reviewed the relevant authorities upon the
>
> E subject:
>
> > The contractual obligations of the parties under the written agreement (P1) must be given effect. I am reminded of the principle that developed in the case of *Walsh v Lonsdale [1882 W 1127]* (1882) 21 Ch D 9 to the effect that an agreement for a lease is said to be as good as a lease if it is capable of specific
> >
> > F performance based on sufficient acts of part performance. In *Haji Abdul Rahman and another v Mahomed Hassan* [1917] AC 209, the Privy Council was of the view that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while useless as a transfer or burdening instrument, was good as a contract. In *Lin Nyuk Chan v Wong Sz Tsin* [1964]
> >
> > G MLJ 200, the then Federal Court held that failure to comply with the registration provisions of s 88 of the Sabah Land Ordinance did not render the agreement for a lease invalid and unenforceable. In *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105, the then Federal Court held that a non-registration of a 30-year lease was treated as a specifically enforceable
> >
> > H agreement for a lease. In *Inter-Continental Mining Co Sdn Bhd v Societe des Etains de Bayas Tudjuh* [1974] 1 MLJ 145, the then Federal Court once again held that a purported sublease not in statutory form was good as an agreement for a sublease and specifically enforced it. One common thread that runs through these cases is this: equity intervened and treated an imperfect lease as an
> >
> > I agreement for a lease provided it is valid and enforceable. In the present case, by the doctrine of equitable intervention, the written agreement (P1) would be treated as an agreement for a lease and since it had been partly executed by possession having been taken under it and two buildings have since been built on it, the equitable remedy of specific performance would be undoubtedly an appropriate remedy. It is germane to mention that the proposition that a grant

of specific performance based on an act of part performance must be referable to an existing contract between the parties can be found in the case of *Steadman v Steadman* [1974] 2 All ER 977. A

Returning to the present instance, it may be recalled that the assignment contains an express convenant by the respondents in cl 26 to 'execute and deliver to the bank (the appellant) a charge under the National Land Code 1965' once a strata title in respect of the subject property has been issued. This is a promise de futuro by the respondents to create a legal charge in the appellant's favour over the subject property. In my judgment, the making of the loan by the appellant amounted to part performance of its reciprocal promise. B

In *The Law of Securities: an account of the law pertaining to securities over real and personal property under the laws of the Australian states,* (4th Ed) by Edward Sykes (an Australian work) at p 143, there appears the following passage which I consider helpful: C

Nothing at great length need be said about the case of the express agreement to create a legal mortgage, save that there must be a sufficient memorandum of the contract of mortgage to satisfy the various legislative enactments which are based on the famous s 4 of the English Statute of Frauds, because a contract to create a mortgage is obviously one of the types of contract affected by that section, as being a contract involving the acquisition of an interest in land. Alternatively, there must have been sufficient part performance in accord with the doctrine of equity to take the case out of the statute. The implied agreement may, however, take various shapes. Thus, there may be an ineffectual attempt to create a formal legal mortgage, ineffectual by reason of failure to observe formalities; for example, one rendered ineffectual by the failure of the parties to employ seal. Equity, provided the money has been advanced, looks on the document as implying an agreement to give a legal mortgage and as creating a present mortgage in equity. D E F

The reference to the Statute of Frauds is of no consequence as it has no application in our country. But that apart, it is plain that at least one other jurisdiction that enforces the Torrens system does give effect to an agreement to create a legal mortgage as creating a present mortgage in equity, provided those other features that equity looks for, such as acts of part performance, are present. G

[351] Wylie CJ (Borneo) speaking for the then Federal Court in *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200 at p 204, aptly said as follows: H

It has been said that, when there is uncertainty in a contract, a court of equity will not 'make a contract' for the parties. On the other hand, when there has been part performance (and especially in cases where a tenant has gone into possession under an agreement to lease) a court of equity will not usually refuse to decree specific performance because of uncertainty as to some subsidiary matter, but will endeavour to give effect to the intention of the parties. See *Gregory v Mighell* (1811) 18 Ves 328; 34 ER 341; *Parker v Taswell* (1858) 2 De G & J 559; 44 ER 1106; *Sanderson v Cockermouth & Workington Railway Co* (1849) 11 Beav 497; *Hart v Hart* (1881) 18 Ch D 670. The first two of these authorities concerned I

A contracts for a lease part-performed by the tenant going into possession, and the third concerned a contract for the purchase of land where the land had been conveyed and possession given. In *Parker v Taswell*, the Lord Chancellor expressed himself on this aspect, as follows (at pp 571–572):

B > The second objection which is made to a decree for specific performance is uncertainty in the terms of the agreement, and it is urged, that having regard to the principles on which a court of equity acts, it is impossible to decree specific performance of such an agreement as this ... It must be borne in mind that this agreement has been partly executed by possession having been taken under it; and there are many authorities to shew that in such a case the court will strain its power to enforce a complete performance ... The agreement, moreover, is admitted to be sufficiently certain as to all the substantial parts of it, and the only portions of it to which uncertainty is attributed are subordinate matters. No authority has been cited to shew that in such a case specific performance may not be decreed.

C

D

[352] In the context of the present appeal, there was not merely part performance rather there has been full performance. The land in question has been transferred to SEP for the consideration provided by SPPKB.

E

[353] It must be borne in mind that the sub-purchasers' rights hinged on the fact that SEP was formed, pure and simple, as a device to obtain the Menteri Besar's consent. To all intents and purposes, SEP was merely taking over all the rights and liabilities of SPPKB in the land.

F

[354] To say as was said by the defendants that SEP was not involved in any of the agreements between SPPKB and Nam Bee was wrong. It cannot be denied that the knowledge and intention of the directors of SEP — two directors from Nam Bee and then two directors from SPPKB, must be attributed to SEP. The upshot of it all would be this. That SEP can be said to be a constructive trustee for SPPKB and the sub-purchasers.

G

H

[355] Now, where a person holds property in circumstances in which in equity and good conscience it should be held or enjoyed by another, he will be compelled to hold the property on trust for that other person (*Soar v Ashwell* [1893] 2 QB 390 (CA)). Over the years, the law on constructive trust finds a firmer footing. In *Hussey v Palmer* [1972] 1 WLR 1286 (CA) at pp 1289–1290, Lord Denning MR said that the constructive trust 'is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity. ... It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution'. Again, in *Eves v Eves* [1975] 3 All ER 768 (CA) at p 771, Lord Denning MR succinctly said that, 'Equity is not past the age of child-bearing. One of her

I

latest progeny is a constructive trust of a new model. Lord Diplock brought it into the world in *Gissing v Gissing* [1971] AC 886 at p 897 and we have nourished it.'

[356] According to Edmund Davies LJ in *Carl Zeiss Stiftung v Herbert Smith & Co and another (No 2)* [1969] 2 Ch 276 (CA) at p 300:

> English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand.

[357] While sitting on the High Court bench, I had occasion to say something about constructive trust in the case of *Tan Sri Datuk Dr Mohan Swami & Anor v MISL & Associates Sdn Bhd (No 3)* [2003] MLJU 414; [2003] 7 CLJ 482 at pp 489–490, in this way:

> It is also trite law that the circumstances in which a constructive trust can arise are unlimited in its range. Jemuri Serjan SCJ had occasion to say something about constructive trust in the case of *Ng Tien & Anor v Chow Nim Yan* [1990] 2 CLJ 937; [1990] 1 CLJ (Rep) 209 (SC). There His Lordship writing for the then Supreme Court cited with approval the speech of Slade J, in the case of *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, and His Lordship said at p 376 of the report (the *Ng Tien*'s case):
>
> > As such since he had acted and still acts in a fiduciary capacity which imposes relevant fiduciary duties upon him, he can also be held as a constructive trustee. Again in that same case Slade J at p 398 said:
> >
> > > I do not think that the categories of fiduciary relationships which give rise to a constructive trusteeship should be regarded as falling into a limited number of strait-jackets or as being necessarily closed. They are, after all, no more than formulae for equitable relief. As Ungoed-Thomas J said in *Selangor United Rubber Estates v Cradock (a bankrupt) and others (No 3)* [1968] 2 All ER 1073 at p 1097:
> > >
> > > > The court of equity says that the defendant shall be liable in equity, as though he were a trustee. He is made liable in equity as trustee by the imposition or construction of the court of equity. This is done because in accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee. Trusteeship and constructive trusteeship are equitable conceptions.

With respect, we agree with this view on the formulation of a category of constructive trusteeship.

A The circumstances where constructive trust may arise have been lucidly stated in the case of *Paragon Finance plc v DB Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm)* [1999] 1 All ER 400 (CA). There Millett LJ speaking and writing a separate judgment for the Court of Appeal, succinctly said at p 409 of the report:

B A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from C the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well-known examples of such a constructive trust are *James McCormick v William Grogan* (1869) LR 4 HL 82 (a case of a secret trust) and D *Rochefoucauld v Boustead* [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v Morgan* [1953] Ch 43; [1952] 2 All ER 951 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant E obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person F sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'.

[358] Continuing at pp 502–504, I had this to say:

G

In regard to constructive trust, I need to refer to a book entitled *Constructive Trusts* by M Cope, (1992). There the learned author wrote at pp 8–10, the following salient words:

H The nature of a constructive trust

The constructive trust has been around since at least the 17th century as a residual category that the courts have called into play when they desired to impose a trust and no other suitable category was available (Waters, op cit at p 335). Unfortunately no clear view has emerged in Anglo-Australian law as to I the nature of a constructive trust. No clear principle has been enunciated as the basis for a doctrine of constructive trusts. The reasons and factors determining the trust property, the beneficiaries, duties and powers of the constructive trustee are not clear. There is a great deal of difference of opinion as to the nature and purpose of the constructive trust and a variety of explanations have been offered to explain the imposition of the trust upon the property held by someone.

Different common law jurisdictions have adopted different attitudes towards the person upon whom the trust is to be imposed (*Oakley*, op cit at p 10). As a result a variety of vague and general statements as to the exact nature of the constructive trust are to be found in the Anglo-Australian treatises. It is stated by some authors that the constructive trust will be imposed in circumstances where it would be inequitable to allow the owner to assert full beneficial ownership in property and that it is imposed where a person holds property in circumstances where as a matter of equity and good conscience it should be held by another (*Hanbury and Maudsley*, op cit at p 370). An American judge, Cardozo J, once stated that a constructive trust is imposed whenever property is acquired in such circumstances that holder of the legal title may not in good conscience retain the beneficial interest (*Beatty v Guggenheim* 122 NE 378 (1919) at p 380). There is also a long tradition that the object of the court in imposing a constructive trust is to prevent fraud which would otherwise arise if a person was deprived of particular property which for one reason or another he or she is entitled to (Waters, op cit at p 335). The trust is said to arise when, according to the principles of equity, it would be a fraud to deny the trust (*Meagher and Gummow*, op cit at p 281). The denial of the trust in these circumstances is often said to be unconscionable. In still other explanations the constructive trust is presented as a means which was developed in equity to make a person account for certain property as if he or she had been a trustee under an express, implied or resulting trust. It is said to have developed as a means of making accountable certain persons in defined circumstances where the justice of the case required that they be accountable for the property (Ford & Lee, op cit at p 997). The obligation to account for the property was enforced by requiring the title holder to deliver up the property or to acknowledge the rights of the others to the property and sometimes it was enforced by a declaration that created a personal liability to account without in any way affecting specific property held by the defendant. A further explanation used to explain the constructive trust is that of unjust enrichment. A constructive trust is said to be imposed in order to prevent unjust enrichment (This theory is discussed in more detail below in Chapter 2).

It is not difficult to find examples of a court having imposed a constructive trust for one or other of the above reasons. Each reason taken by itself however is not sufficient to explain the diversity of situations in which constructive trusts have been imposed and such generalisations offer 'little guidance as to the actual situations' (Waters, op cit at p 335) in which the courts have been prepared to impose the trust. Nevertheless it is possible to conclude at least that notions of restitution or the prevention of fraud provide in many instances the underlying rationale for the imposition of most constructive trusts. Finally it should be noted that little attention has been given to the word 'constructive' when used in this context. The editors of *Jacobs' Law of Trusts in Australia* suggest that the trust is 'constructive' in that equity construes the circumstances by explaining or interpreting them and that the trust is not a trust which is construed by equity. What equity does is to attach legal consequences to the circumstances (*Meagher and Gummow*, op cit at p 281).

A And I gratefully adopt them. According to the case of *AW Scott* (1955) 71 LQR 39, in some jurisdictions the constructive trust is regarded as a remedy for many cases of unjust enrichment. Cardozo J, in *Beatty v Guggenheim Exploration Co* 225 NY 380 (1919) at p 386 aptly said:

B ... a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

C **[359]** Now, there are compelling reasons to lift the corporate veil. The following reasons for lifting the veil of incorporation would be sufficient:

(a) as demonstrated earlier the mechanism by which the land was transferred to SEP is clear cut;

D (b) the consideration for the land was provided by SPPKB which in turn obtained the necessary funds from the sub-purchasers;

(c) SEP did not pay any money for the land;

(d) the directors of SEP were also the directors of SPPKB;

E (e) SEP was set up by Nam Bee with the full consent of SPPKB; and finally

(f) the directors of SPPKB and SEP were always aware that SEP was a device or a vehicle wherein SPPKB acquired the land.

F **[360]** No court of law would prevent the veil of incorporation from blocking out the essential and actual transaction that took place. Here, once the veil has been lifted, you will see that SEP is in a position of a constructive trustee for SPPKB and the sub-purchasers in respect of the land.

G **[361]** SEP has openly acknowledged its liability to the sub-purchasers for their agreements with SPPKB. Exhibit D14 has been reproduced earlier and its contents clearly show that SEP took over the responsibility for agreements between the sub-purchasers and SPPKB. The defendant submitted that exh D14 was not valid because it was issued after the R & M had taken over H the affairs of SEP. Two observations must, however, be advanced. Firstly, exh D14 relates to matters that took place long before the R & M took over. Exhibit D14 too acknowledges the relationship and nexus between SPPKB, SEP and the sub-purchasers. Secondly, even though the R & M has taken over certain functions of SEP, SP8 was still a director. The debenture does not I restrict SP8's powers to represent SEP or speak on behalf of SEP.

[362] SP8 as the director of SEP was clearly entitled to issue exh D14 and when SP8 gave evidence he was giving evidence as to matters that occurred before the receivership.

[363] It must be borne in mind that SP8 was, at all material times, the director of SPPKB and SEP and he dealt directly with the sub-purchasers. SP8 was the umbilical cord that link the sub-purchasers to SPPKB and SEP. He has both the knowledge and the authority to speak on behalf of both SPPKB and SEP. And his authority to speak on behalf of SEP continued even after the R & M were appointed. It must be emphasised that he was still the alter ego of SEP. Whereas the R & M were only the agents of SEP.

[364] There is no one else other than SP8 who could speak for SEP as to the occurrences at the material time. I must reiterate that the evidence of SP8 binds SEP and it is the only evidence adduced on behalf of SEP.

[365] It boggles the mind to see how the solicitors for SEP can deny or challenge the evidence of SP8 who was the director of SEP whilst at the same time representing SEP. In any event, the nexus between SEP and the sub-purchasers had been acknowledged by the directors' of SEP through contemporaneous documents long before the receivership.

[366] One cannot deny that the land was transferred to SEP as constructive trustee for SPPKB and the sub-purchasers. The available evidence clearly show that:

(a) the sub-purchasers entered into the sale and purchase agreements with SPPKB for the purchase of their respective lots; and that

(b) SEP stepped into the corporate shoes of SPPKB and SEP must be held to be the constructive trustee of the land for SPPKB and flowing from that the equitable and beneficial rights of the sub-purchasers surfaced.

[367] Our courts have consistently recognised and give precedence to equitable rights which are prior in time and are not severed by a bona fide purchaser for value without notice. The following authorities would be sufficient to support what I have said:

(a) *Yong Joo Lin Yong Shook Lin and Yong Loo Lin v Fung Poi Fong* [1941] MLJ 63;

(b) *Chin Cheng Hong v Hameed & Ors* [1954] MLJ 169;

(c) *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196;

(d) *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224;

(e) *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116;

(f) *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145;

(g) *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45;

(h) *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169;

(i) *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53;

(j) *Dr Ti Teow Siew & Ors v Pendaftar Geran-Geran Tanah Negeri Selangor* [1982] 1 MLJ 38;

(k) *Ar Pl Palaniappa Chettiar v Pl Ar Letchumanan Chettiar & Anor* [1982] 1 MLJ 232;

(l) *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81;

(m) *Krishna Kumar v United Malayan Banking Corporation Bhd* [1983] 1 MLJ 106;

(n) *United Malayan Banking Corporation Bhd v Development and Commercial Bank (Ltd) Bhd* [1983] 1 MLJ 165;

(o) *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320;

(p) *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384;

(q) *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (f)* [1984] 1 MLJ 160;

(r) *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113;

(s) *Mosbert Berhad (in liquidation) v Chatib bin Kari* [1985] 1 MLJ 162;

(t) *Bhagwan Singh & Co Sdn Bhd v Hock Hin Bros Sdn Bhd* [1987] 1 MLJ 324;

(u) *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330;

(v) *Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, intervener)* [1989] 1 MLJ 381;

(w) *Standard Chartered Bank v Yap Sing Yoke & Ors* [1989] 2 MLJ 49;

(x) *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1990] 3 MLJ 180;

(y) *Lim Ah Hun v Pendaftar Hakmilik Tanah, Pulau Pinang & Anor* [1990] 3 MLJ 34;

(z) *Keng Soon Finance v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, interveners)* [1996] 2 MLJ 431;

(aa) *Dr Benjamin George & Ors v Majlis Perbandaran Ampang Jaya and other applications* [1995] 3 MLJ 665;

(bb) *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; and

(cc) *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805.

[368] All these authorities must be read to mean that SEP has to honour and be bound by the rights of the sub-purchasers.

[369] As promised, I will continue to allude to the fiduciary position of the first defendant. I must reiterate that the first defendant was acting as the plaintiffs' solicitor and was therefore a trustee and the land was bought by him on their behalf in that capacity. The land was actually sold to the purchasers and not to the first defendant personally. Consequently, the sub-purchasers are entitled to the land as a whole and not only to the portions that were sold to them collectively by SPPKB. The basis for this simple deduction is based on the existence of a solicitor-client relationship between the first defendant and the sub-purchasers in respect of the land.

[370] The High Court held, against the weight of the available evidence, that there was no solicitor-client relationship (see p 69 of the appeal record). I must now examine the evidence of the first defendant. When the first defendant was cross-examined, learned counsel for the plaintiffs asked the first defendant to admit that there was a solicitor-client relationship between him and the sub-purchasers. A lot of time was spent on this. It is rather interesting to read the evidence of the first defendant in regard to the solicitor-client relationship.

[371] However, amidst all the rubble, one salient feature appears. That the first defendant could not deny that he did act as a solicitor for the sub-purchasers. At p 613 of the appeal record B2, the first defendant was asked this question under cross-examination:

> S: Did you state on oath that you never acted as solicitor or lawyer for either the sub-purchaser or the committee, from the time they came to see you to the time you made the 2nd bid.

[372] And the first defendant answered it in this way as seen at p 614 of the appeal record B2:

> J: I did as a solicitor write letters stating that I was acting for sometimes the committee as ((sic) and) sometimes for the sub-purchaser but I wrote those letters at the request of committee or some members of the committee but not whilst I was appointed by individual members of the committee. While writing the letters I acted as their lawyer and conducted myself as a lawyer insofar as writing those

letters. Yes I represented myself as their solicitor only insofar as I wrote their letters as well as when I was consulted on their problems, I did give legal advice. Yes, particularly the first time when the first group came to see me.

[373] The first defendant continued to testify under cross-examination in regard to the letters which he wrote as seen at pp 615–616 of the appeal record B2:

> The letters that I wrote are firstly, letter dated 22.8.1992 at pp 40–42 (AB-1); secondly, letter of 14.9.1992 at pp 44–45 (AB-1); thirdly, letter dated 14.9.1992 at pp 163–165 (AB-1); fourthly, letter of 5.10.1992 at pp 46–48 (AB-1).
>
> When I gave evidence in chief, I was referring to these letters. When I said I wrote as solicitors I meant these 4 letters.

[374] The representation as well as the conduct of the first defendant together with the string of letters written by the first defendant and by others to the first defendant — all categorically establish the solicitor-client relationship. At times, the first defendant said that he acted for the sub-purchasers. And later he said that he only acted as a solicitor in regard to some letters. It was quite dramatic, to say the least. It was an excellent display of mental prowess second to none.

[375] The first defendant did not deny that he was consulted as a lawyer by the committee. He too went to the meeting at the Tamil school on 30 August 1997 with the sub-purchasers. There he represented the sub-purchasers in negotiating with SP8 and he obtained a letter to protect the interests of the sub-purchasers.

[376] Many letters were written by the first defendant. And likewise many letters too were written to the first defendant. All these varied letters confirm and show categorically the solicitor-client relationship.

[377] In chronological order, the first letter would be a letter from the first defendant's law firm Messrs Bachan & Kartar addressed to the Registrar of Land Titles at Ipoh, Perak. That letter was dated 27 August 1992 and it was written in the Malay language and excerpts of it are as follows (see pp 40–41 of the appeal record C5):

> Kami bertindak untuk Jawatankuasa lima ratus enam puluh empat (564) pembeli-pembeli kecil (sub-purchasers) yang telah membeli lot-lot tanah yang berlainan dalam saiznya dalam tanah yang dikenali sebagai Pajakan Negeri 35553 Lot No: 125, Mukim Hutan Melintang, Daerah Hilir Perak, Negeri Perak .... Pelanggan-pelanggan kami telah membeli tanah-tanah mereka daripada SPPKB yang telah membeli tanah tersebut daripada Nam Bee Rubber Estate Sdn Bhd yang

merupakan pemilik berdaftar pertama tanah tersebut. ... Semua 564 pembeli-pembeli kecil telah mengambil milikan tanah-tanah individu mereka selepas pembelian dan telah mengusahakan tanah-tanah mereka dengan tanaman kelapa sawit dan telah berterusan tanpa apa-apa gangguan memiliki tanah-tanah mereka. Pelanggan kami telah mengusahakan tanah-tanah mereka dan mendapat hasil jualan buah kelapa sawit. Setakat ini kesemua 564 pembeli-pembeli kecil telah membayar sejumlah lebih kurang tiga juta ringgit kepada SPPKB. Baki harga jualan adalah lebih kurang $3.5 juta dan pelanggan kami sedia, rela dan sanggup membayarnya. ... Kami dengan segala hormatnya memohon kerjasama pihak tuan untuk memasuki Kaveat Pendaftar menurut seksyen 320 Kanun Tanah Negara untuk mengelakkan 'fraud and or improper dealings' tanah tersebut. Kami dalam proses mengambil tindakan undang-undang mengenai perkara ini terhadap pihak yang berkenaan.

[378] The second letter would be a letter dated 30 August 1999 from SP8 to Messrs Bachan & Kartar as reproduced in the early part of this judgment and that letter was a letter signed by SP8 but it was prepared by the first defendant and that letter carried the words 'as solicitors for the sub-purchasers'.

[379] The third letter is a letter dated 8 September 1992 from the first defendant to the R & M sent by hand and it was worded as follows (see p 158 of the appeal record C5):

Re: Sale by Tender of Land Known as Pajakan Negeri No. 3553 Lot No. P.T. 125 Mukim of Hutan Melintang.

I refer to the sale which is scheduled to close at 5.30 p.m. on the 8th. September, 1992.

I enclose herewith:

(a) A form of Tender duly completed and signed;

(b) A bankers cheque, Bank of Commerce Berhad No. 424528 in the sum of $400,100.00 being the 10% earnest money.

I shall be glad if you could kindly acknowledge receipt of this application on a copy of this letter.

Thank you.

Yours faithfully,

Sgd.: Illegible

(Gurbachan Singh s/o Bagawan Singh)

Sgd.: Illegible

Ernst & Young

5.10 pm.

[380] And the third letter is accompanied by a tender form which reads as follows (see p 159 of the appeal record C5):

FORM OF TENDER

TO:

The Receiver and Manager

Simpang Empat Plantations Sdn Bhd

(Receivers and Managers Appointed)

c/o Ernst & Young

35 Jalan Hussein

30250 Ipoh

The tenderer named and described hereunder HEREBY OFFERS TO BUY the property of SIMPANG EMPAT PLANTATIONS SDN BHD (Receivers and Managers Appointed), particulars of which are set out in the:

Section A: Form of Tender

Section B: Details of Inquiry and Tender Procedure

Section C: Terms and Conditions of Tender

Section D: Draft Sale and Purchase Agreement

for the tender price upon the terms and conditions of tender contained in the abovementioned documents.

Full name of tenderer GURBACHAN SINGH S/O BAGAWAN SINGH

Address of tenderer 118, JALAN NG WENG HUP, 30100 FIRST GARDEN, IPOH, PERAK

Tender Price Offered

(i) Plantation Land and Building (As per Attachment I)	$4,000,000.00
(ii) Office Equipment/Furnitures and Fittings (As per Attachment I)	$ 1,000.00
	$4,001,000.00

The fourth letter would be a letter dated 14 September 1992 from the law firm of the first defendant Messrs Bachan & Kartar addressed to the R & M where the first defendant described the sub-purchasers as his clients and that letter can be seen at pp 163–165 of the appeal record C5 and at pp 44–45 of the appeal record C5.

[381] Now, the fourth letter dated 14 September 1992 appears as two

letters. One letter can be seen at pp 44–45 of the appeal record C5 while the other letter can be seen at pp 163–165 of the appeal record C5. In the letter as seen at pp 44–45, there was no mention of the first defendant taking the land and then selling it to the sub-purchasers. So the R & M was under the impression that it was solely for the benefit of the sub-purchasers. However, the first defendant needed the other letter at pp 163–165 of the appeal record C5 to bind the sub-purchasers. And the drama surrounding exhs P63, P63A and P63B (see pp 1963, 1964 and 1965 respectively of the appeal record C2) unfolded where the first defendant alleged that the letter was at the initiative of SP14. Fortunately, SP14 refused to sign the letter in exh P63.

[382] The fifth letter would be by way of a statutory declaration dated 26 September 1992 marked as exh P11B of the first defendant in support of the entry of a private caveat as seen at pp 1594–1595 of the appeal record C1. In that statutory declaration, the first defendant described himself as the solicitor appointed by numerous sub-purchasers and that what he deposed to in the statutory declaration was derived from the documents and verbal instructions from his clients.

[383] The sixth letter dated 28 September 1992 was from Ernst & Young to Messrs Bachan & Kartar for the attention of the first defendant. That letter contained a passage which reads 'you have in fact made the tender bid on behalf of your clients (ie the 741 or so sub-purchasers)'. And it was marked as exh ID61 which was later marked as exh P82 as seen in the appeal record C2 at p 1960. Initially, the first defendant was shown exh ID61 and he said that he could not 'recollect' this letter. He was then shown exh P82 (also found at p 2032 of the appeal record C2) which carried the 'received' chop by Messrs Bachan & Kartar, and his memory suddenly revived and he then explained how he had challenged this letter with Dato' Robert Lim.

[384] The seventh letter dated 2 October 1992 was from Ernst & Young to Messrs Bachan & Kartar for the attention of the first defendant as seen at p 166 of the appeal record C5 and that letter spoke of deferring the tender date and Ernst & Young would hold the earnest money of $400,100 paid by the first defendant being 10% of the tender price until 7 November 1992 without interest.

[385] The eighth letter dated 5 October 1992 was a reply to Ernst & Young by Messrs Bachan & Kartar as seen at p 167 of the appeal record C5 and the first paragraph of that letter stated, 'We act for Mr Gurbachan Singh and the 741 sub-purchasers'.

[386] The ninth letter, so to speak, would be the statutory declarations taken cumulatively by the first defendant's office supporting the filing of caveats for the purchasers marked as exhs P11B, P18B, P20B, P21B, P23B, P24B, P25B, P26B and P27B as seen at pp 1594, 1633, 1640, 1645, 1656, 1664, 1668 and 1696 respectively of the appeal record C1.

[387] All these documents together with the conduct of the first defendant speak a thousand words. They establish the solicitor-client relationship between the first defendant and the sub-purchasers in respect of the latter's rights in the land.

[388] A solicitor has a fiduciary duty in equity to his client. The solicitor and client relationship carried with it obligations on the solicitor's part to act with absolute fairness and openness towards his client (*Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831). A solicitor must not without the informed consent of his client stand to make any profit or receive any benefit other than his professional remuneration from the transaction which he is retained to carry through. It is no defence to the solicitor to say that his interest is indirect, like for instance, where the transaction is between his client and a company in which he or a member of his family has a significant shareholding or where he otherwise has an indirect financial interest in the transaction. And whether present or prospective, there must be a potential benefit to the solicitor of pecuniary consequence or perhaps personal advantage in or through the transaction in which his advice is sought for. In this context, Lord Upjohn once observed in *Boulting and another v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at p 638, that the conflict rule '... must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not to some theoretical or rhetorical conflict'.

[389] The loyalty of a solicitor to his client must be undivided. The solicitor cannot properly discharge his duties to one whose interests are in opposition to those of another client. And if there is a conflict in his responsibilities to one or to both clients he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting. Scrutton LJ once said in *Fullwood v Hurley (1)* [1928] 1 KB 498 (CA), at p 502:

> No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment.

[390] Here, the first defendant has multiple clients — 741 or so sub-purchasers or 217 sub-purchasers as per the writ. All his clients have similar and related interests — to own the land. Therefore he must be able and be prepared to look after their interests. All the sub-purchasers expected the first defendant to protect their interests. Nothing short of that.

[391] Apart from the contractual duties arising from his retainer, a solicitor's general duty is to exercise skill and care. On top of that, the solicitor too owes a fiduciary duty to his client. Such duties need not be confined to the terms of the contractual retainer. The Court of Appeal in *Conway v Ratiu; Note* [2005] EWCA Civ 1302; [2006] 1 All ER 571, held that some fiduciary duties may extend beyond the termination of the retainer.

[392] As a fiduciary, a solicitor owes his client a duty to put his client's interest above his own. The solicitor must at all times advance his client's interests, not his own. The solicitor is not permitted to be acting for his client as well as for himself as undisclosed principal. And when a solicitor shifts his capacity from that of solicitor to principal, he puts himself in a position of actual conflict of interest and duty.

[393] It was submitted, and rightly so, that a solicitor-client relationship is a very special fiduciary relationship. And that any benefit obtained by the solicitor should accrue to the client and that the solicitor is holding that benefit as a trustee for the client. In *Barclays Bank plc v O'Brien and another* [1993] 4 All ER 417 at p 423, in the context of an undue influence, the House of Lords said that:

> A person who has been induced to enter into a transaction by the undue influence of another (the wrongdoer) is entitled to set that transaction aside as against the wrongdoer. Such undue influence is either actual or presumed.

[394] The English Court of Appeal in *Bristol and West Building Society v Mothew* [1998] Ch 1, lucidly laid down the duties and obligations of a fiduciary. Writing a separate judgment, Millett LJ had this to say at p 18 of the report:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core

liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work *Fiduciary Obligations* (1977) at p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

[395] Has the first defendant shown a 'single-minded loyalty' to the sub-purchasers who had retained him? The answer would be in the negative. I must now highlight the 'several facets' of the first defendant's 'core liability', and for this purpose an examination of the available evidence must now be undertaken.

[396] A few days before 27 August 1992, some of the sub-purchasers came to see the first defendant about the first auction. They gave the first defendant the necessary instructions as to their claim to the land. They asked the first defendant to attend a meeting at Simpang Empat. It was on the basis of these instructions that the first defendant wrote to the Registrar of Land Titles at Ipoh on 27 August 1992.

[397] Before this, the first defendant met SP13 an employee of Ernst & Young and who happens to be the first defendant's client and a friend. SP13 told the first defendant about SD12's wish to help the sub-purchasers. The first defendant noticed that there was some land that was still not allocated to any sub-purchasers. From his conversation with SP13, the first defendant saw some possibilities of securing some personal gain. The first defendant knew that the sub-purchasers' equitable rights could be a useful bargaining tool to get the land at a low price.

[398] The first defendant then went to the meeting at the Tamil school. There he reassured the sub-purchasers, before he went to see SP8, that he would protect their interests. That was after all the purpose for his presence there.

[399] The first defendant managed to enlist the assistance of SP18 to provide a letter that confirmed the relationship between SEP and SPPKB and the sub-purchasers.

[400] The first defendant then met SP13. Out of their discussions, a grand design unfolded. It was this. That the first defendant would make a bid for the land in his own name under cover of appearing to act for the sub-purchasers.

[401] It must be borne in mind that, at this juncture, the first defendant knew the following set of facts:

(a) the basis of the sub-purchasers' claims;

(b) that the R & M were sympathetic towards the sub-purchasers;

(c) that the R & M prefer to sell to the sub-purchasers;

(d) that the sub-purchasers would not encounter any difficulty in securing the Menteri Besar's consent;

(e) that other potential buyers would shy away by the sub-purchasers' interests;

(f) the actual value of the land in question;

(g) the numerous valuations reflecting the sub-purchasers' interests;

(h) that SP13 would be the first defendant's inside man; and

(i) at the land office, the first defendant had SP13 to rely upon.

[402] Armed with this knowledge, the first defendant formulated his plan with the assistance of SP13. And the ingredients of the plan were as follows:

(a) secure the profitability by purchasing the land below the market price;

(b) eliminate potential competitors who may wish to bid for the land at the auction;

(c) ensure that the first defendant's bid succeeds using the sub-purchasers as a leverage;

(d) convince and dissuade the sub-purchasers from pursuing any legal action to assert their equitable rights; and

(e) deny the sub-purchasers from enjoying the profits altogether.

[403] In order to ward off competitors and emphasise the rights of the sub-purchasers to the whole world at large, so to speak, the first defendant adopted the following measures:

(a) he caused a registrar's caveat to be entered on the land;

(b) he caused to be entered private caveats by individual sub-purchasers; and

(c) meanwhile, SP13 played his role by explaining the problems to the sub-purchasers of the potential bidders.

[404] All the measures which the first defendant took succeeded. The first defendant was the sole bidder in both the auctions.

[405] The first defendant succeeded in convincing MBF and Ernst & Young that he represented the sub-purchasers and that he was making a bid on their behalf. The letters emanating from the first defendant depicted the plight of the sub-purchasers. Indeed if the purpose of the first defendant was to bid on behalf of the sub-purchasers, why didn't the first defendant register the names of the sub-purchasers on the title to the land or transfer the land to a company where all the sub-purchasers would own shares when the first defendant succeeded in the second auction bid? That would have been the best courses of action for the first defendant to pursue and fulfill. After all, the first defendant is the fiduciary and he had an onerous fiduciary duty to discharge.

[406] Ernst & Young was convinced that the first defendant was acting for the sub-purchasers when he was bidding for the land. Ernst & Young perceived the acceptance of the first defendant's bid as the only way to help the sub-purchasers.

[407] The first defendant kept the sub-purchasers in check by telling them that they have no cause of action because MBf did not have notice of their equitable rights. The sub-purchasers wholeheartedly trusted the first defendant. After all, he was their lawyer. Consequently, no action was taken to enforce the sub-purchasers' equitable rights.

[408] SP13 was certainly in league with the first defendant. Exhibit D43 as seen at p 2631 of the appeal record C4 written by SP13 revealed their unsavoury relationship. Exhibit D43 was handwritten by SP13 and it was worded as follows:

15/9/1992

Dear Bachan,

With regard to our discussion yesterday, I would like my stake to be offerred and put in writing from you, on the matter.

Please be reasonable and fair.

You know <u>all</u> that I have done.

I verily belief ((sic) believe) that it is unfair to still keep me in the dark.

I would like to have some Land there, and I have excellent plantation experience.

If you want me to manage your lands, that depends on the offer of salary etc etc. However, you could include this together * with your confirmation as mentioned in para one above, or we can discuss on this amicably later.
Please revert within one week.
I'll put your deal thru on my part, but as I said, the final decision rests with the top man.
I have not let you down todate.
Regards
Suppiah
* Not conditional on the stake.

[409] Another handwritten message to the first defendant from SP13 marked as exh D44 as seen at p 2632 of the appeal record C4 reads as follows:

To Bachan

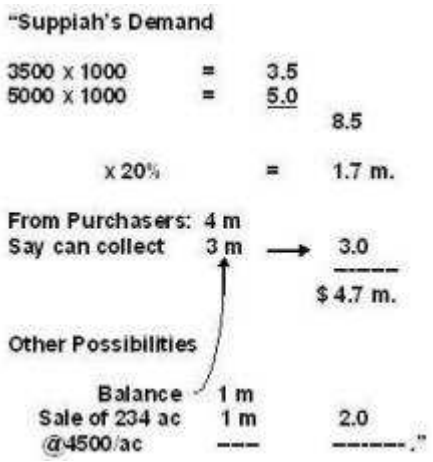
Re: Settlement

Suppiah.

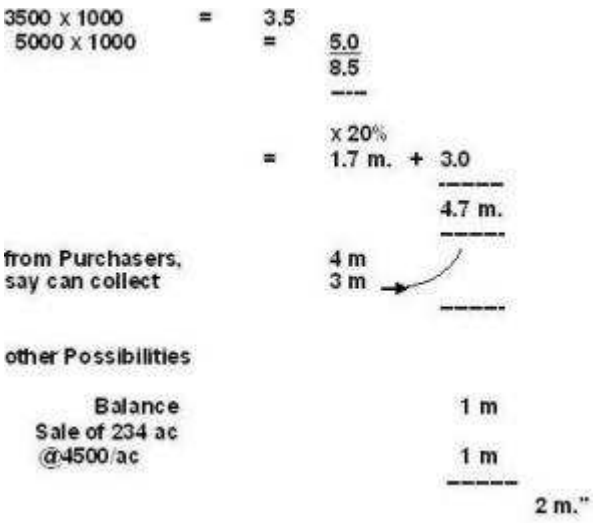
[410] Yet another handwritten message by SP13 to the first defendant marked as exh D54 can be seen at p 2644 of the appeal record C4 and it was worded in this way:

Dear Bachan
1. Please instruct your client Mr. Tan Tan Seng not to see MBF today. MBF called me to say that they (committee) are going to meet MBF today.
2. Please meet me in my house at 8.00 p.m. today. Have to show you some document(s), can't do it in Pakeeza.
Don't call in the office.

[411] A handwritten document marked as exh D51 as seen at p 2641 of the appeal record C4 carried the caption 'Suppiah's Demand'. That would refer to SP13's demand and it was written in this way:



[412] Exhibit D52 as seen at p 2642 of the appeal record C4 was also handwritten by SP13 and it was worded like this:



[413] There was an unholy alliance between SP13 and the first defendant. By calling SP13, the plaintiffs managed to show that:

(a) SP13 was a close friend and client of the first defendant;

(b) SP13 was in charge of the first auction;

(c) SP13 supplied the first defendant with vital information as to the land and the sub-purchasers;

(d) SP13 provided the relevant information about the problematic sub-purchasers to the first defendant;

(e) there was sympathy for the sub-purchasers by the R & M; and

(f) the sub-purchasers' interests were reflected in the several tiered valuations.

[414] And the evidence of SP13 on these points went unchallenged. Some pertinent questions may also be posed. Why SP13 made demands on the first defendant unless there was some sort of deal between them? Why the first defendant did not reply to those demands? If the first defendant was innocent of such dealings, why did he not report SP13 to the police or to the R & M?

[415] In raising the funds to bid for the first auction, the first defendant did not involve the sub-purchasers at all. The first defendant has contacted

some of his friends who had put the necessary finance and this enabled the first defendant to bid at his own leisure. Fortunately, the first bid did not get off the ground because of the ex parte injunction filed by SP8. It was a blessing in disguise. If the first defendant had succeeded in his first bid, the land might have been transferred to the first defendant's group of friends without the knowledge of the sub-purchasers.

[416] After the first defendant had transmitted his bid and the banker's cheque on 8 September 1992, he tried to cover himself by getting SP14 to send in a letter as per exh P63 in SP14's capacity as the chairman of the pro-temp committee. That leter in exh P63 was to convey the message that the sub-purchasers supported the first defendant's bid. SP14 became suspicious and he refused to sign the letter in exh P63.

[417] That did not deter the first defendant. He wrote the letter in his capacity as the solicitor for the sub-purchasers. The letter was written in two styles — one as seen at pp 44–45 of the appeal record C5 while the other can be seen at pp 163–165 of the appeal record C5. In court, however, the first defendant said that the letter which he wrote to Ernst & Young was initiated by SP14.

[418] Now, when the land was put up for auction for the second time, some of the first defendant's financial backers had pulled out. So the first defendant had to find an alternative source for funds. This time, the first defendant got the sub-purchasers to be involved. He told the sub-purchasers to raise the funds to bid at the second auction.

[419] It was submitted that if all the sub-purchasers had paid up their balances under the SPPKB agreements, the first defendant would have raised four to five million ringgit from the sub-purchasers. This amount would certainly cover the auction price. Calculation wise, the sub-purchasers had bought approximately 2,200 to 2,400 acres of the land through SPPKB. That would still leave about 1,500 acres left for the first defendant to acquire for his own benefit free of charge.

[420] The land measured 3,681 acres and it was valued at about RM14m. Calculation wise, per acre would be roughly in the region of RM3,800. And the first defendant's free acquisition of 1,500 acres would be worth approximately RM5.7m.

[421] It must be recalled that at the meeting before the second auction, the first defendant had a dialogue with the sub-purchasers. He managed to convince them that the bid has to be made in his own name. The sub-purchasers were under the impression that the first defendant would bid

for the land on their behalf and upon securing the bid, the first defendant would transfer the land to a company where all the sub-purchasers would have shares. And that the first defendant would then purchase the 1,500 acres from the company at a reasonable price. And the proceeds of the sale of 1,500 acres to the first defendant would be utilised to pay the loan and reimburse any deposit paid by the sub-purchasers towards the costs of the auction price.

[422] Some moneys were collected from some of the sub-purchasers towards the auction price. The rest was put up by the first defendant.

[423] The first defendant succeeded at the second auction. He then met the sub-purchasers again. This time around, the first defendant was more curt. He presented to the sub-purchasers the 'take it or leave it' option. The sub-purchasers now had to buy their original plots from the first defendant on the basis of the supposed balances due to SPPKB as per exh P42.

[424] The first defendant ignored the terms of the agreements which the sub-purchasers had entered with SPPKB.

[425] When the first defendant referred to the land as his land, the sub-purchasers were not too pleased. They were shocked, to say the least. And when the sub-purchasers raised the issues that were raised between them and the first defendant at the last meeting, the first defendant remainded steadfast and was adamant that the land was now his and no one else. The first defendant's stand was that the sub-purchasers had to either sign agreements with him or they would stand to lose their plots of land. When the sub-purchasers protested, the first defendant ridiculed them and told them that they are all uneducated and stupid. The first defendant even ventured to say: 'Lu orang macam mana jadi pun, jadilah.' It must have been a nightmare for all the sub-purchasers. The lawyer whom they trusted had side-tracked them, so to speak.

[426] Three pertinent questions fitting for the occasion at hand must be advanced. Firstly, did the first defendant adhere dutifully to the standards that his fiduciary position required of him? Secondly, did the first defendant act in the best interests of his clients, namely, the sub-purchasers? Thirdly, did the first defendant allow his personal interests to dominate and, consequently, create a conflict of interest situation? The answers to these three germane questions must be in the positive.

[427] It was unconscionable on the part of the first defendant to ignore the equitable rights of the sub-purchasers and forced them to buy the land which they had already bought and paid for. The evidence piled up against the first defendant is simply overwhelming. It would be perverse, in the extreme, to

hold otherwise. The case against the first defendant is not based on a gross exaggeration of the evidence. On the contrary, it is based on hard solid evidence.

[428] Another germane question to pose would be this. Can the first defendant say that after all his wheelings and dealings he would not benefit a single cent and that what he did was solely for the benefit of his clients — the sub-purchasers? I cannot answer for him. But the available evidence speak a thousand words.

[429] In regard to the issue of s 214A of the NLC that was not raised on the pleadings of any of the defendants but was suddenly put in through the back door at the submission stage before the High Court by MBf, I have this to say.

[430] MBf argued that the agreements between SPPKB and the sub-purchasers were in breach of s 214A of the NLC and therefore illegal. Section 214A of the NLC enacts as follows:

> 214A Control of transfer of estate land
>
> (1) Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever ... unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as 'the Board') established under subsection (3).
>
> (2) The Registrar shall not register any instrument of transfer of such land under Part Eighteen of this Act unless such instrument is accompanied by a certificate of approval granted by the Board.
>
> (3) For the purpose of this section there shall be established an Estate Land Board consisting of —
>
> (a) the State Secretary, who shall be the Chairman; ...
>
> (aa) the State Director, who shall be the secretary; and
>
> (b) not more than four members appointed by the State Authority from amongst members of the Public Service.
>
> (4) The proprietor or any co-proprietor of any estate land desiring to transfer, convey or dispose of in any manner whatsoever such land shall, together with the person or persons to whom the land is to be transferred, conveyed or disposed of, jointly submit an application to the Secretary of the Board in Form 14D.
>
> (5) The Board may approve an application made under subsection (4) and shall have power to refuse or cancel an approval of any such application if —
>
> (a) It is satisfied that any statement or representation made in the application is false or incorrect; or

A (b) It is satisfied that the applicant fails or refuses to comply with any direction given or restrictions or conditions imposed by it; or

(c) It appears to it that the approval of the application will not be in the public interest.

B (6) Decision of the Board shall be by majority of votes; and in the case of equality of votes the Chairman shall have a casting vote. (7) Before making any decision the Board may as it thinks fit call any person to give any statement before it or produce any document to be examined by it.

(7) Before making any decision the Board may as it thinks fit call any person to C give any statement before it or produce any document to be examined by it.

(7A) The decision of the Board shall be conveyed by the Secretary of the Board to the applicants referred to in subsection (4) as expeditiously as possible.

(8) Where approval of an application under subsection (4) is refused or D cancelled by the Board, the applicant may, within 30 days after the communication to him of the Board's decision of such refusal or cancellation, appeal in writing to the State Authority.

(9) The State Authority may confirm or reverse the decision of the Board:

E Provided that where the decision of the Board is reversed by the State Authority, the State Authority may give such direction or impose such restriction or condition as it may think fit.

(10) Any person who obtains or attempts to obtain approval of the Board by knowingly making or producing or causing to be made or produced any false F or fraudulent declaration, certificate, application or representation, whether in writing or otherwise or who fails or refuses to comply with any direction, restriction or condition imposed on him shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM10,000 and where the offence is a continuing one shall be further liable to a fine of not G exceeding RM1,000 in respect of each day the offence is committed.

(10A) (a) Any person who transfers, conveys or disposes of or attempts to transfer, convey or dispose of in any manner whatsoever, any estate land in contravention of subsection (1), shall be guilty of an offence H and shall on conviction be liable to imprisonment for a term of not less than one year and not more than three years and to a fine not exceeding ten thousand dollars.

(b) For the purposes of this section, the execution of an agreement to convey or dispose of the whole of an estate to two or more persons, or I to convey or dispose of any portion or portions of an estate land to one or more persons, without the approval of the Board, shall be conclusive proof that the estate land is conveyed or disposed of in contravention of subsection (1); and any act to demarcate an estate land or to cause or permit the demarcation of estate land otherwise than in accordance with the provisions of this Act shall be prima facie

proof that the person so acting, causing or permitting attempts to transfer, convey or dispose of the estate land in contravention of subsection (1).

(11) For the purpose of this Act 'estate land' means any agricultural land held under one or more than one title the area or the aggregate area of which is not less than 40 hectares and the alienated lands constituting such area are contiguous.

(12) For the purpose of this Act, alienated lands held under final title or qualified title or a combination thereof, shall be taken to be contiguous notwithstanding that they are separated from each other only by such land as is used, required or reserved for roads, railways or waterways.

[431] A close scrutiny of s 214A of the NLC reveals that it does not prohibit the making of contractual agreements of sale. What is required is this. That such sales, before they can be registered in the individual names of the buyers, have to obtain the statutory consent from the estate land board. Indeed this is true in respect of all sales that require some form of consent from some relevant authority.

[432] The rigmarole to comply with the provisions of s 214A of the NLC would be as follows. Firstly, the parties have to enter into a sale agreement. Secondly, when the parties have completed all the mutual obligations under the contract then they are ready to transfer the property. Thirdly, it is at this point of time, that the parties apply for the statutory consent. Fourthly, after obtaining the statutory consent, the land is duly transferred and registered in the name of the purchaser. However, a caveat must be incorporated. If and only if for some reason the statutory consent is refused, then the sale will fall through.

[433] Thus, as demonstrated it is quite wrong to make a sweeping statement that s 214A of the NLC bars contracts for the sale of an estate land.

[434] The then Supreme Court held in *Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor* [1993] 2 MLJ 289 that no application to the estate land board was required to be submitted because s 214A(4) of the NLC stipulates that the application for approval is required only when the transfer, conveyance or disposal in any manner whatsoever of the estate land is made to two or more persons. The Supreme Court also held that where the estate land or only a portion of it is to be transferred to one person, the estate land board's approval is not required.

[435] The sale agreement in *Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor* was not an issue. Rather the issue was whether there was a need to obtain the approval of the estate land board for the sale and transfer of the

land in the name of the second respondent — one person only. And the Supreme Court answered it in the negative.

[436] Both *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [2002] 2 MLJ 399; [2002] 1 AMR 1201 (FC) and *Rengamah a/p Rengasamy v Tai Yoke Lai & Anor* [1998] 5 MLJ 260 (HC) sided the plaintiffs and these two cases laid down a singular principle of law and that would be this. That s 214A of the NLC is not a bar to agreements for the sale of land but rather it is only a bar to the registration of the transfer pursuant to the agreement.

[437] Section 214A(4) of the NLC clearly provides that the owner of estate land must make the application for approval to the estate land board jointly with the intended purchaser. There is no need to obtain approval first before entering into any form of agreement with the intended purchaser. The agreement in this case accorded with the language and spirit of s 214A(1) of the NLC as it provides that there can be no transfer of the land without approval of the estate land board having first been obtained. The agreement, being a conditional agreement, was therefore not illegal, and could not be declared null and void. It would only become null and void if the estate land board refused approval of the sale of the land, which was not the issue before the court (per Augustine Paul JC (now FCJ) in *Rengamah a/p Rengasamy v Tai Yoke Lai & Anor*).

[438] It is part and parcel of my judgment that the High Court was wrong when it held that the agreements between SPPKB and the sub-purchasers were illegal and void because s 214A of the NLC was contravened. Here, no application has been filed jointly between the owner and the sub-purchasers to the estate land board for approval. So, how could the conditional agreements between SPPKB and the sub-purchasers be held to be illegal and void?

[439] At any rate, the SPPKB agreements do not provide for sub-division. The sub-purchasers became owners of lots that were not sub-divided. And this is what is commonly called as a 'ground partition'. The beneficial interests of the sub-purchasers in the land are preserved. If, in the near future, the sub-purchasers agree between themselves that they wish to subdivide then they are entitled to do so and it is only at that point of time that they must make a joint application to the estate land board for approval. It is up to the estate land board to approve it or otherwise.

[440] Even the first defendant drew up agreements with the 43 purchasers without any approval from the estate land board which must surely be in the

nature of 'a ground partition'. I must categorically hold that the defendants' reliance on s 214A of the NLC was totally misconceived. A

[441] This was certainly a representative action in accordance with O 15 r 12 of the Rules of the High Court 1980 ('RHC') and it makes not a whit of a difference that none of the four plaintiffs testified in court. Lord Shand in *The Duke of Bedford v Ellis and others* [1901] AC 1 at p 14 explained the pith and depth of O 15 r 12 of the RHC in these erudite terms: B

> The ruIe has been framed and adopted for a useful and important object — the saving of the multiplication of actions, with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant. A series of different actions one after another by different plaintiffs is to be no longer necessary in cases where numerous persons have 'the same interest in one cause or matter', for in such cases 'one or more of such persons may sue on behalf or for the benefit of all persons so interested'. C D

[442] It is enough to justify a person suing in a representative action if he has a common interest with those whom he claims to represent. The sole test to apply is that of 'the same interest' in one cause or matter. The pre-requisites for invoking O 15 r 12 of the RHC are: E

(a) there must be numerous persons with the same common interest arising out of the same contract or the same grant or claim pertaining to the same subject matter; F

(b) the reliefs sought by these numerous persons must not be personal but beneficial to the class as a whole; and

(c) the plaintiffs and those represented in it must be members of a class having a common interest and a common grievance and the reliefs sought are beneficial to all of them. G

[443] It would be ideal to refer to *In re Braybrook, Braybrook v Wright* [1916] WN 74; *Markt & Co, Limited v Knight Steamship Company, Limited and another appeal* [1910] 2 KB 1021 (CA) at p 1040; *Eh Riyid v Eh Tek* [1976] 1 MLJ 262 (FC); *Voon Keng & Ors v Syarikat Muzwina Development Sdn Bhd* [1990] 3 MLJ 61; *Mohd Latiff bin Shah Mohd & Ors v Tengku Abdullah ibni Sultan Abu Bakar & Ors and other actions* [1995] 2 MLJ 1 and *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2003] 4 MLJ 332 in order to understand the ramifications of O 15 r 12 of the RHC in a better light. H I

[444] I have taken an arduous route in writing this judgment. It is simply to emphasise that the appellate court will readily interfere with the findings

of fact of a trial court where the trial court which had the advantage of having seen and heard the evidence of the witnesses had fundamentally misdirected itself or that there was insufficient judicial appreciation or that the finding of a specific fact was not dependent upon the credibility of witnesses but rather upon inferences drawn from other facts (*Kerry v Carter* [1969] 1 WLR 1372 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA) and *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 (FC).

[445] Whyatt CJ in *In re AB Ltd* [1956] MLJ 197 at p 200 aptly said:

> ... that an appellate court may allow an appeal from a determination on a question of fact if it appears to the appellate court that a misconception of law has been responsible for the determination. All these authorities are reviewed in a very recent case, *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14; [1955] 3 All ER 48; [1955] 3 WLR 410; 36 TC 207 in which Lord Radcliffe delivered, as usual, if I may respectfully say so, a brilliantly clear judgment in which he said:
>
> > It may be the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In these circumstances ... the court must intervene. I do not think that it matters whether the state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three.
>
> I too, with respect, prefer the third test and applying it the primary facts found in the present case, I am of the opinion there is only one true reasonable conclusion and that is that the respondents are carrying on the trade of selling grave spaces in this cemetery.

[446] I am aware of the need to be cautious and the speech of Wan Suleiman FJ in *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214 rings true when His Lordship said:

> ... it would be wrong of us who have not seen or heard the witnesses, to substitute our own finding for that of the learned trial judge.

[447] But what Gopal Sri Ram JCA (now FCJ) said in this court in *Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373 at p 379 must also be heeded:

Unless we, as a court of appeal, are convinced that there was no judicial appreciation of evidence by the trier of fact, or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case taken as a whole, it will not be open to us to intervene and upset the findings made by a trial judge.

CONCLUSION

[448] For the reasons adumbrated above, I would intervene and I would allow the appeal with costs here and below. The decision of the High Court is hereby set aside. The deposit to be returned to the plaintiffs.

[449] What this amounts to is this. That I would allow prayer 43(a)(i) of the re-amended amended statement of claim (for a declaration that the first and the second defendants were at all material times solicitors of the plaintiffs and are therefore under a fiduciary duty and accountable to the plaintiffs for any benefits that they have obtained under the sale by tender of the said land). I would also allow prayer 43(a)(ii) of the re-amended amended statement of claim (for a declaration that the first defendant is a trustee for the plaintiffs with respect to the purchase by sale by tender of the said land from the R & M of the third defendant's company (SEP)). Prayer 43(a)(iii) of the re-amended amended statement of claim is also allowed (that the first four plaintiffs herein be declared new trustees of the aforesaid declaration of trust in place of the first defendant). Prayer 43(a)(iv) of the re-amended amended statement of claim (that the R & M of the third defendant's company (SEP) do make the necessary rectifications and variations to the agreement dated 30 March 1994 with the first defendant to incorporate the declaration of trust aforesaid and the inclusion of the new trustees as in prayer 43(a)(iii) above) is also allowed. I would also allow prayer 43(a)(v) of the re-amended amended statement of claim (that the sale and purchase agreement entered into by some of the plaintiffs with the first defendant be declared null and void). Prayer 43(a)(vi) of the re-amended amended statement of claim is hereby allowed (that the first and the second defendants to refund all moneys paid by some of the plaintiffs under the sale and purchase agreement stated in prayer 43(a)(v) above together with interest at 8%pa from the date of filing of this writ). I would also allow prayer 43(a)(vii) of the re-amended amended statement of claim (that the transfer of property known as PN 35553, Lot 9108 Mukim of Hutan Melintang, Hilir Perak to the fourth defendant (Regal) be declared null and void). Prayer 43(a)(viii) read with prayer 43(f) of the re-amended amended statement of claim are also allowed in that the said land be vested in the first four plaintiffs who are the new trustees and who will hold the said land in trust and who will administer the said land and who will distribute the same on a just basis. The new trustees too will have to draw up a scheme for the implementation of a

just distribution of the said land which will be transferred and registered in the names of the numerous sub-purchasers subject to the consent of the estate land board. I also allow prayer 43(a)(viv) read with prayer 43(f) of the re-amended amended statement of claim in that the register document of title and the issue document of title to the said land be rectified as per prayer 43(a)(viii) above subject to the consent of the estate land board.

[450] Further, I also make an order as per prayer 43(b)(i) of the re-amended amended statement of claim (for a declaration that the plaintiffs are the lawful and/or the beneficial owners of the undivided shares in the said land corresponding to the size of the plots purchased by each of them under agreements from SPPKB).

[451] I too make an order as per prayer 43(c)(i) of the re-amended amended statement of claim for an account and inquiry before the senior assistant registrar of the High Court, Ipoh, Perak as to the use of the said land by the first defendant and/or by the fourth defendant (Regal) and the profits thereby derived. And I too make an order as per prayer 43(c)(ii) of the re-amended amended statement of claim for the payment of the said profits to the plaintiffs.

[452] I also make an order as per prayer 43(d)(viii) of the re-amended amended statement of claim for damages to be assessed by the senior assistant registrar of the High Court, Ipoh, Perak for the benefit of the plaintiffs. Finally, pursuant to prayer 43(f) of the re-amended amended statement of claim, I make an order that the parties be at liberty to apply for further orders or directions.

[453] In regard to costs, it must be emphasised as was highlighted by Zainun Ali JCA that there were 93 exhibits involved with 33 witnesses subpoenaed and 157 documents to be perused. The notes of evidence recorded by the High Court came to almost 1,000 pages. The preparations for the trial at the High Court and the appeal in this court must be tedious in the extreme. The costs incurred must be colossal. But the award of costs has always been at the discretion of the court (*Re Datuk Lim Kheng Kim, ex p Malayan Banking Bhd* [1990] 3 MLJ 496; [1990] 2 CLJ 682). According to O 59 r 1 of the RHC, 'costs' includes fees, charges, disbursements, expenses and remuneration. The purpose of awarding costs to the plaintiffs is simply to indemnify them for the expenses they had incurred in successfully establishing their legal rights. In *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25 at p 26, Hashim Yeop A. Sani SCJ (later

the Chief Judge of Malaya) writing for the then Supreme Court had this to say:

> The general principle envisaged in the rule is simply that costs follow the event and that the successful party is entitled to be paid his costs except when it appears to the court that in the circumstances of the case some other order should be made. The same principle was enunciated in greater detail by Parker LJ in *Ottway v Jones* [1955] 2 All ER 585 at p 591:
>
> > One starts with this, that, as a general principle, costs follow the event, and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise, and those grounds, it is well settled, must be grounds connected with the cause of action. No doubt, also, where a plaintiff has wholly failed to establish his title or his right, it is impossible judicially to order the successful defendant to pay the plaintiff's costs. Indeed, as is shown by the cases to which my Lord has referred, it is there said that the occasion for the exercise of the discretion does not arise until the plaintiff has established his right.
>
> Because costs is in the discretion of the court there has been a rule of practice of the House of Lords as stated by Viscount Cave LC in *Donald Campbell & Co Ltd v Pollak* that no appeal would lie for costs only but the House will however entertain an appeal from an order of the Court of Appeal as to costs, where it is alleged that the order is founded upon an error of law.

[454] Mohamed Dzaiddin J (later the Chief Justice of Malaysia) in *Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd* [1990] 1 MLJ 304 at p 305, aptly said in regard to the question of costs:

> Clearly, the powers of the court in dealing with the question of costs is found in O 59 r 4(1) (which is similar to O 62 r 4(1) of the English Rules of the Supreme Court). It reads as follows:
>
> > Costs may be dealt with by the court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the court for the payment of any costs may, if the court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.
>
> From the above rule, it is clear that the court may deal with the question of costs at any stage of the proceedings or after the conclusion of the proceedings. Secondly, the court may, if it thinks fit, order the payment of costs to be paid forthwith notwithstanding that the proceedings have not been concluded. The cases of *Adam*

& Harvey Ltd v International Maritime Supplies Co Ltd [1967] 1 All ER 533 and *Allied Collection Agencies Ltd v Wood & Anor* [1981] 3 All ER 176, and the commentary in *The Supreme Court Practice 1985* para 62/4/1 would appear to me to lay down the general principle that even if the court did not make an order for costs to be taxed and paid forthwith, a party to a summons who was awarded costs was entitled to have them taxed and paid forthwith, although the action had not yet been tried. This was followed by Shankar J in *East Asiatic Co (M) Sdn Bhd v Kilang Papan Sdn Bhd* (KL Civil Suit No 2157/85) (unreported). On the other hand, the judgment of Smith J in *Chow Yong Hong v Chow See Lim & Anor* [1959] MLJ 23 was to the effect that the proceedings being interlocutory, the general rule was that the costs should be settled at the conclusion of the suit.

[455] Apart from the statutory basis to award costs as found in O 59 of the RHC, the power to award costs would be essentially and exclusively judicial (per Gaudron J in *Re Dingjan and others; Ex parte Wagner and another* (1995) 183 CLR 323 at p 360).

[456] The House of Lords too asserted an inherent jurisdiction over the issue of costs (*Edmund Bowes, JB Martin and WL Kent v Charles Shand, Alexander Shand and RA Robinson* (1877) 2 App Cas 455 at pp 472 and 485; *The Guardians of West Ham Union v The Churchwardens and Overseers and Guardians of the Poor of the Parish of St Matthew, Bethnal Green* [1896] AC 477 and *R v Chief Metropolitan Stipendiary Magistrate, ex parte Osman* [1988] 3 All ER 173 at p 175).

[457] The poverty of the plaintiff in *Jones v Coxeter* (1742) 26 ER 642; (1742) 2 Atk 400, prevented her from carrying on with her case unless she obtained costs and Lord Chancellor Hardwicke ordered costs to be taxed and paid to her.

[458] Exercising my judicial discretion by following the guidelines laid down by Viscount Cave LC in *Donald Campbell and Company, Limited v Pollak* [1927] AC 732 at p 811 and that of Jessel MR in *Cooper v Whittingham* (1880) 15 Ch D 501 at p 504, I would award costs in favour of the plaintiffs in the sum of RM50,000 to be paid by the defendants forthwith.

[459] I have shown the draft judgment to my learned brother Abu Samah Nordin JCA and he has kindly agreed with it. Consequently, the draft judgment is the majority judgment of this court.

[460] I too have shown the draft judgment as a matter of courtesy to Zainun Ali JCA and Her Ladyship has since prepared her draft dissenting judgment.

Appeal allowed with costs here and below.

Reported by Kanesh Sundrum